Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DAWN AKERS, KIM LORANGER, AND UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 6000,
Petitioners,

v.

KENNETH L. MCGINNIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May the Michigan Department of Corrections by broad rule ban or regulate all off-duty contact between all Department employees and (1) any of the Department's prisoners, parolees, or probationers and (2) any family member or listed visitor of any of the Department's prisoners, parolees, or probationers?

Does the "public concern" threshold established in *Connick v. Myers*, 461 U.S. 138 (1983), apply to public employees' free association claims as well as their free speech claims?

What are the proper standards for determining whether a broad rule banning or regulating the off-duty associations of public employees violates their rights to expressive, intimate, and other forms of association?

PARTIES

Petitioners are Dawn Akers, Kim Loranger, and Local 6000 of the United Automobile, Aerospace, and Agricultural Implement Workers of America. They were plaintiffs in the District Court and appellants in the Court of Appeals. Akua Mitchell-Davis was an additional plaintiff in the District Court. When the appeal was taken, her claims were moot, although her name continued to be listed in the case caption. She is not a petitioner in this Court.

Respondents are Kenneth McGinnis, Robert Steinman, Marsha Foresman, Patricia Caruso, John Marshall, Edward Haggerty, George Marra, William Overton, Ruth Bare, Frank Eisenhauer, Joseph Jereckos, John Makowski, Terry Pitcher, Kirk McVittie, and Gwen Rodgers. Respondents are or were management officials of the Michigan Department of Corrections. They were defendants in the District Court and appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The District Court's Opinion and Order adopting the Magistrate Judge's Report and Recommendation on defendants' motion to dismiss, thus granting the motion as to claims for monetary damages, is unreported. App. 97a, 109a, 114a. The District Court's Order adopting the Magistrate Judge's Report and Recommendation on plaintiffs' motion

for a preliminary injunction, thus granting the motion, is unreported. App. 75a, 96a. The Magistrate Judge's Report and Recommendation on the parties' cross-motions for summary judgment is unreported. App. 58a. The District Court's Opinion and Order declining to adopt the Report and Recommendation and granting summary judgment to the defendants is unreported. App. 48a, 56a, 57a. The decision of the Sixth Circuit Court of Appeals is reported at 352 F.3d 1030 (CA6 2003). App. 1a. The Sixth Circuit's Order denying rehearing en banc is unreported. App. 47a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 2003. App. 45a. On February 19, 2004, the Court of Appeals denied a timely petition for rehearing en banc. App. 47a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND WORK RULE INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

The four relevant iterations of the Michigan Department of Corrections work rule in question are reproduced in the appendix. App. 115a, 118a, 121a, 123a.

STATEMENT OF THE CASE

This case presents important questions about the right to free association of public employees. One of the questions is the subject of a well-developed, explicit split in the Court of Appeals. Another is not so much the subject of a split as of widespread confusion in which there are multiple standards applied by the different circuits.

The explicit split involves standards governing the regulation of expressive association by public employees and raises the question whether such association must touch on a matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983), in order to merit protection under the balancing test set forth in *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968). The Second, Sixth, and Seventh Circuits have held that the *Connick* threshold does apply to association, with the Seventh Circuit indicating it may revisit this position due to misgivings about its correctness. The Fifth and Eleventh Circuits have held that the *Connick* threshold does not apply to association. The Tenth Circuit has held that it should be employed in cases involving overlapping speech and association claims and, noting the split, has declined to rule on whether it should apply to pure association claims. The Eighth Circuit has developed an independent approach that does not include the threshold. The First and Third Circuits have noted the conflict but found it unnecessary to reach the question.

The second major question involves standards governing the regulation of intimate association by public employees. Here the Courts of Appeals have reached different conclusions on virtually every element of the analysis, starting with the source of the relevant doctrine.

In addition, the case poses questions about the use of broad, prophylactic rules to regulate associational conduct.

A. The Work Rule

The work rule in question in this litigation bans all off-duty contact between employees of the Michigan Department of Corrections ("MDOC") and three groups: (1) Michigan probationers, parolees, and prisoners (collectively "offenders"); (2) family members of offenders; and (3) those who are on the visitor's lists for Michigan prisoners. App. 115a-124a.

The ban applies to employees working in any capacity. It applies to any offender, regardless of the nature of his or her offense, as well as to any family member of an offender, regardless of his or her prior or current relationship to the employee or to the offender. It does not matter whether the employee has any responsibility for the offender—or even whether the employee works in a facility or office that has any responsibility for the offender. It is the broadest restriction of the associational rights of public employees on record in the federal courts. By conservative estimate, it bans all contact between the 2000 UAW-represented employees and some 500,000 persons who are under the supervision of MDOC or who are family members or visitors of someone under the supervision of MDOC. [1]

MDOC justifies the rule with reference to concerns about security and abuse. But fully half of the offenders with whom employees may have no contact are on probation—and the overwhelming majority of persons with whom contact is banned have committed no offense other than being related to someone who has become involved in the criminal justice system. Moreover, it is undisputed that MDOC did not trans-

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[1] In 1999, there were approximately 120,000 offenders in Michigan: 65,000 probationers, 13,000 parolees, and 45,000 prisoners. Offenders thus constituted approximately one percent of the state's population. The combined total of parents, siblings, spouses and children of those persons is unknown—but certainly numbers in the hundreds of thousands. *See* Court of Appeals Joint Appendix ("JA") 437-438.

form the rule into a zero-tolerance ban because of any widespread problems of employee misconduct arising out of contact with offenders, their family members, and their visitors; in fact, there is no evidence that such misconduct ever amounted to more than isolated incidents. Rather, as the Magistrate Judge found in a Report and Recommendation whose factual determinations were later adopted by the District Court, MDOC turned the rule into a broad and absolute ban because of negative arbitration and court decisions:

> The testimony of [MDOC's Deputy Director] and [MDOC's Special Assistant to the Director] establishes that this zero tolerance policy was developed as a result of the MDOC losing several arbitration awards and receiving unfavorable rulings in the case of *United States v. Michigan*, 680 F.Supp 270 ([WDMI] 1988). . . . At least one of the reasons for the unfavorable results received by MDOC at these arbitrations was the perceived inconsistency of the discipline meted out by the MDOC for violations of [the rule]. Obviously unhappy with these losses in arbitration, the MDOC threw caution to the wind and adopted the zero tolerance policy which requires the discharge of an employee who has non-professional contact with a family member of a prisoner, parolee or probationer, regardless of whether that contact presents any legitimate concerns for the MDOC.

App. 81a-82a. While MDOC's articulated concerns about security and conflicts of interest are legitimate, their link to the work rule is attenuated, abstract and hypothetical.[2]

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[2] For example, when asked about problems of favoritism in MDOC that were linked to off-duty contact, MDOC's Deputy Director was unable to identify a single instance of such misconduct. JA 432. Similarly, while defendants' affidavits referred to the possibility of employees becoming involved in prison escape plots, there is no evidence of any employee ever having been involved in such a plot. JA 223.

Over the course of this litigation, MDOC has changed the number of the rule in question from Rule 12 to Rule 24 to Rule 46. The earlier and harsher version of the rule is a zero-tolerance policy under which discharge is mandated for all violations, without regard to the particular nature of the employee's associational interests or to the state's interests as employer. In April 2000, following the grant of a preliminary injunction to the plaintiffs, the rule was modified in three ways: to define "family members" for the first time; to contemplate discipline less than termination for violations of the rule; and to initiate an exception procedure allowing employees to apply for permission to have contact with offenders' family members and visitors.[3]

The exception procedure grafted onto the rule was purely discretionary, incorporating no standards governing how a request would be evaluated. As of the close of the record, almost all requests had been granted.

The Sixth Circuit majority focused most of its analysis on the earlier, no-exceptions, mandatory-discharge version of the rule. The majority upheld that version and then found that because the later version was less restrictive of employees'

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[3] Here is an expanded statement of the rule's history during the litigation: Plaintiff Kim Loranger was fired in April 1996, when the Rule was called Rule 12. App. 123a. Prior to Loranger's termination, MDOC had made a decision to enforce Rule 12 with mandatory discharge. That policy was not expressed in the text of the rule. Two months after Loranger was fired, the rule was repromulgated as Rule 24; the rule's language now reflected MDOC's zero-tolerance, mandatory-discharge policy, but was otherwise materially the same. App. 121a. Plaintiff Dawn Akers was fired shortly after the adoption of Rule 24. In September 1999, the rule was repromulgated as Rule 46 without significant substantive alteration. App. 118a. In April 2000, following the grant of a preliminary injunction to the plaintiffs, Rule 46 was amended in the manner described above in the text. App. 115a. After the record closed, in November 2003, the exception procedure was extended to contact with offenders themselves as well as their visitors and family members.

associative rights than the earlier one, it was necessarily valid as well.

Because this rule is so broad, it suspends normal associational life. The conduct it interrupts ranges from the most casual to the most concerted association and spans the spectrum of ways in which people relate to one another, including political and religious association, intimate and close personal association, commercial and professional association, and hybrids of these modes and others. The overwhelming majority of this associational conduct has no relationship to MDOC's interests.

B. The Parties and the Trial Court Record

Petitioners are Local 6000 of the United Automobile, Aerospace, and Agricultural Implement Workers of America ("the UAW" or "Local 6000") and two UAW members terminated under the work rule, Dawn Akers and Kim Loranger.

Respondents are or were the Director of the MDOC and other MDOC management officials sued in their official and individual capacities for promulgating and enforcing the work rule.

The UAW represents 20,000 professional and paraprofessional State of Michigan employees in human services and administrative support units. Some 2,000 are MDOC employees: teachers, social workers, medical and psychological service providers, probation and parole officers, and clerical workers. The UAW does not represent correctional officers or prison guards. JA 282.

1. Akers and Loranger

Akers, a clerical employee in the bookkeeping office of a prison, was terminated for giving a parolee a ride to a job interview. Loranger, a probation officer in Detroit, was terminated for innocuously responding to several letters from a prisoner in Michigan's Upper Peninsula. Both Akers and

Loranger had excellent work records and MDOC never alleged that either employee's conduct was improper in any way except in that it technically violated the work rule.[4] Arbitrators subsequently set aside both terminations and imposed instead suspensions. JA 172, 288-292.

Later, Loranger sought MDOC's permission to attend Mass with her oldest friend, whose adult son had been placed on probation elsewhere in Michigan years after Loranger's friendship with his mother had begun. Loranger wanted her friend to attend her own son's baptism and to be his godmother. MDOC denied Loranger's request, since contact with a probationer's mother would violate the rule. Loranger was thus compelled to obtain a preliminary injunction in order to attend the baptism of her son with a longtime friend whom she wanted to be her only child's godmother. JA 171-174; App. 75a.

2. Additional Record Examples Of Associational Conduct Interrupted By The Rule

The rule sweeps within its proscription association for the purpose of pursuing political and civic purposes. For example, during most of the relevant time period the president of Local 6000 was Lynda Lewis. JA 282. Lewis was also often an official of the Democratic Party and a participant in labor, charitable, and community organizations. JA 283. In early 2000, her nephew was sentenced to a prison term. *Ibid.* Her nephew requested that Lewis, who was herself not covered by

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[4] Both employees had been consistently commended by MDOC management. Akers's overall job performance was repeatedly described as "exemplary" and her friendly professionalism in relating to prisoners who worked as clerks in her accounting office was singled out for praise. JA 289. Loranger's supervisor called her "my top agent and of the highest caliber" an ex-supervisor said she possessed "professional and personal integrity . . . beyond question" and was "morally incapable of knowingly violating a departmental rule." JA 197, 203.

the MDOC's rule, be put on his list of approved visitors. JA 282-283.

Lewis thus became a person with whom 2000 MDOC employees could have no off-duty contact. The earlier version of the rule—to which MDOC is free to revert under the Sixth Circuit's ruling—would have forbidden employees, on pain of mandatory discharge, from sitting down with Lewis to engage in political discussion, to plan charitable fund-raising, or for any other purpose. They would have been barred from attending meetings of all kinds—or, for that matter, union picnics, weddings, or musical concerts—if Local 6000's president was also going to be there. Under the new version of the Rule, hundreds of employees would have to advise the employer of their intended association by filling out exception forms in order to attend these same events.

Beyond political, civic, and religious association—and beyond family choices and friendships ranging from casual to intimate—the rule interferes with the entire spectrum of associational conduct that defines daily life. The record included many further undisputed instances of interactions and activities barred by the rule, including these:

- The rule prohibited plaintiff Loranger from having any contact with a young woman whom she had mentored for sixteen years through a Big Sister-Little Sister program because the woman had been placed on probation under the supervision of an office other than Loranger's. JA 375-376.
- The rule barred one UAW official from have any contact with the majority of his neighbors, including saying hello to them, because someone in almost every family was on probation or otherwise under the supervision of the MDOC. JA 410-411.
- The rule barred employees from attending Alcoholics Anonymous meetings if any other attendees were offenders, their relatives, or their visitors. JA 416.

> Similarly, it barred them from having contact with their doctors, drycleaners, lawyers, fellow Parent-Teacher Association members, and bowling-league competitors when those individuals were offenders (whatever their crime) or when those individuals were visitors or family members of offenders. JA 441-442.

At the preliminary injunction hearing, the Magistrate Judge observed that his brother-in-law was an offender and asked whether MDOC officials would be allowed to attend a cocktail party at which the Magistrate was a guest. Because the rule did not then include any definition of "family member," MDOC's Deputy Director was unsure whether a brother-in-law would fall within the prohibited class. If so, he testified, the MDOC officials would indeed be barred from attending the party. JA 435-437. [5]

Since the facts were undisputed, after the preliminary injunction proceedings, both sides moved for summary judgment. The Magistrate Judge recommended a finding that the old rule was unconstitutional and that issues surrounding the constitutionality of the new rule were not ripe for review. The District Court declined to adopt this recommendation and upheld both versions of the rule.[6]

C. The Sixth Circuit Majority and Dissent

The Sixth Circuit affirmed the District Court's ruling in a split decision, rejecting the arguments of the petitioners and

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[5] Under the revised rule, MDOC officials could attend parties with the Magistrate freely, since brothers-in-law are not covered. If, however, it had been the Magistrate's brother, MDOC officials would have to apply for an exception to attend a party with the Magistrate.

[6] The District Court had, as noted, earlier granted the plaintiffs a preliminary injunction. The conflict between the two rulings appears to result from the fact that the defendants did not file objections to the Magistrate Judge's Report and Recommendation urging that the injunction be granted, but chose instead to modify the rule.

of amicus curiae American Civil Liberties Fund of Michigan. Chief Judge Boggs wrote for the panel majority.

The majority first held that the petitioners' challenge to the original rule was not moot, on grounds that (1) "a defendant's voluntary cessation of unlawful conduct ordinarily does not suffice to moot a case," and that (2) Akers and Loranger had been disciplined under the original zero-tolerance rule. The court's opinion thus began with, and focused on, the challenge to the original rule. App. 5a (citations omitted).

Following *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), the panel majority divided the petitioners' claims into two categories: those addressing the right of expressive association—that is, associational conduct that facilitates other activities protected by the First Amendment–and those addressing the right of intimate association. It located the former in the First Amendment and the latter in the Fourteenth Amendment's due process clause. App. 5a-6a.

The majority held that "state employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims." App. 6a (citation omitted). In turn, it found that standard to be defined by two of this Court's decisions: *Pickering, supra,* which mandates a balancing test between the interests of the employee as a citizen and the interests of the state as an employer, and *Connick, supra*, which establishes a "public concern" threshold that must be reached if an employee's interests are to receive the benefit of *Pickering* balancing. The Sixth Circuit likened *Pickering* balancing to intermediate scrutiny and held that a regulation of speech (or here, association) not touching on a matter of public concern under *Connick* is subject instead to rational basis review. App. 7a-9a.

The panel majority then found that none of the associational conduct barred by the work rule touched on a matter of

public concern. The majority acknowledged that private conduct may touch on a matter of public concern. App. 10a–11a. It did not address MDOC's refusal to allow Loranger to attend church with her friend or most of the other record examples of associational conduct interrupted by the rule, such as participation in Parent-Teacher Association meetings and other community events. The court found that the plaintiffs "c[a]me closest" to meeting the public concern threshold when asserting the right of MDOC employees to have off-duty contact of various kinds with Lewis, the Local 6000 president who was also a party official and a civic leader. However, the panel majority found that such contact could otherwise be regulated under statutes such as the Hatch Act, even though those statutes do not bar public employees from having contact with officials of political parties. App. 10a-11a.

Having thus determined that the work rule was subject to rational basis review, and addressing only in passing the argument that MDOC had failed to demonstrate any nexus between its interests and the preponderance of the associational conduct swept within the rule, the majority found that the rule did not violate the petitioners' First Amendment rights. App. 12a-13a.

The opinion next addressed the petitioners' claim that the rule violated their right of intimate association. The majority held that rational basis review generally applied to this species of constitutional inquiry as well, except in cases of "direct and substantial interference with intimate association." App. 13a-14a (internal citations omitted). Citing earlier Sixth Circuit cases about anti-nepotism rules, the majority found that "we have abstracted a general rule that we will find direct and substantial burdens only where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large

portion of the otherwise eligible population of spouses." App 14a-15a (internal citation omitted). Because the petitioners had not alleged such a dramatic infringement of the right to marry, the court again found that rational basis review applied. Since it had already found the rule survived such scrutiny, it held that the rule did not unlawfully violate the petitioners' right of intimate association. App. 15a-16a. The court did not address plaintiff Loranger's right to choose her child's godmother. Nor did it address the petitioners' contentions about the broad range of personal relations with no adverse impact on MDOC's interests that are fractured by the rule.

The majority then turned briefly to the revised rule with its exception procedure. Since the petitioners agreed that the new rule was more lenient than the original one, the court held that the new rule was itself necessarily permissible. In any event, the court noted, because the exception procedure would be evaluated under a rational basis standard, it would pass muster regardless of its lack of standards. App. 17a-18a.

Judge Clay concurred in part and dissented in part. He analyzed the work rule under the Eighth Amendment standards established for prison regulations in *Turner v. Safley,* 482 U.S. 78 (1987), and found that the original rule was in several respects not sufficiently related to legitimate penological interests to pass constitutional muster. App 27a-30a. In particular, Judge Clay found that "[t]o require MDOC employees to extricate themselves from community events and organizations in which offenders also happen to participate represents a significant intrusion on the employees' personal liberty." App 33a-34a. Judge Clay also noted that MDOC had not cited any examples at all of improper favors being done for offenders' family members and visitors: "Thus, the MDOC has not based its prohibition against relationships with family members or visitors on particular cause but on questionable speculation that such contacts con-

ceivably could threaten prison security." App. 37a (internal citation omitted).

Judge Clay also found that the fully discretionary exception procedure grafted onto the revised rule failed to render the rule constitutional. App. 37a-39a.

He found that the rule should be modified to eliminate any prohibition on incidental or unknowing contact with offenders, their visitors, and their family members and that the exception procedure should incorporate standards to guide management decisions regarding concerted contact with family members and visitors of offenders. Judge Clay opined that "[w]ithout these common-sense modifications, [the work rule] is an exaggerated—indeed, ridiculous–response to the MDOC's legitimate concern over maintenance of prison security." App. 41a-42a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED ARE URGENT.

This case provides the Court with an urgent opportunity to address the free association rights of public employees. Since 1968, when the Court decided *Pickering, supra,* and thereby established the basic balancing test governing the free speech rights of public employees, it has repeatedly revisited the contours of those rights to refine them. *See, e.g., Connick, supra; United States v National Treasury Employees Union,* 513 U.S. 454 (1995). In contrast, in the same time period, the Court has never addressed associational rights in the public sector. Indeed, the last time it did so was the year before *Pickering* was decided, in *Keyishian v. Bd. Of Regents of the University of the State of N.Y.*, 385 U.S. 589 (1967), when it addressed the important but narrow set of issues surrounding public employees' membership in political organizations thought to be subversive. The Court has never addressed broader infringements of public employees' expressive and/or political associational rights, and has never in any circum-

stance addressed infringements of public employees' right to intimate association. In consequence, the law in this area is in disarray. As to expressive association, the lower courts agree that the Court's speech precedents have some application but differ sharply over the extent to which the analogy holds. In particular, the Courts of Appeals have split over whether to apply *Connick*'s "public concern" threshold to free association claims. *See infra*, at 16-20. As to intimate association, there is even less consistency: some courts locate the right in the First Amendment and some locate it in the Fourteenth Amendment's due process clause. In practical terms, the level of protection for intimate association varies greatly between circuits. *See infra*, at 20-23.

This disarray matters. It causes uncertainty and it tends to lead to the undervaluation of free association rights, as in this case. Both of these consequences affect an enormous number of people since public employees now constitute almost one fifth of the civilian workforce in the United States.

Further, the employment practices of public employers influence general social norms. Because there is no impermeable barrier between government as employer and government as sovereign, public employment practices that undervalue free association rights will tend to undermine those rights in civil society more generally, albeit in a diffuse manner.

This case provides a clean and broad slate. The facts are undisputed. Every variety of associational conduct is affected by the rule being challenged: personal friendships and family decisions; core political and religious association; participation in a wide range of community groups such as charities, Parent-Teacher Associations, and Alcoholics Anonymous; receipt of professional services from lawyers and doctors; and casual interactions in one's neighborhood or at social events. In addition, the case presents questions about the legitimacy of broad prophylactic rules in this context, and about the

minimum showing of nexus an employer must make in order to justify such a rule. *Cf. NTEU, supra.*

The division and confusion in the courts on the important questions presented here reveal the need for a transparent and unified approach to the associational rights of public employees. Absent guidance from the Court, such an approach—one that is consistently capable of doing justice to the interests on both sides—appears virtually certain not to develop.

II. THE COURTS OF APPEALS HAVE SPLIT OVER THE APPLICATION OF *CONNICK*'S "PUBLIC CONCERN" THRESHOLD TO PUBLIC EMPLOYEES' EXPRESSIVE ASSOCIATION CLAIMS.

In *Roberts, supra,* this Court recognized two distinct types of association entitled to heightened protection under the Constitution: "certain intimate associations" that must be secured "against undue intrusion by the State because of the role of such relationships in safeguarding . . . individual freedom," and "the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 617.

In the public employment context, expressive association has been analogized to free speech by the Courts of Appeals, and with one exception each one that has squarely considered the issue has adopted the balancing test established by this Court in *Pickering* to analyze free association claims.[7] The

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[7] The Eighth Circuit has not adopted *Pickering* for free association claims but has cited it as supporting by analogy its own approach, described variously as "an intermediate level of scrutiny" and "a case-by-case reasonableness analysis." The Eighth Circuit approach includes no "public concern" threshold either in name or in substance. *International Association of Firefighters, Local No. 380, et al. v. City of Kansas City, et al.* 220 F.3d 969, 973 (8th Cir. 2000).

Pickering Court repudiated the notion that public employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [public institution] in which they work." *Pickering supra*, 391 U.S. at 568. The public employer did, however, possess "interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of the citizenry in general." *Ibid.* The Court concluded that "[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The circuit court split presented by the instant case involves *Connick*, in which the Court elaborated upon the references in *Pickering* to "matters of public concern." *Connick* prescribed a detailed inquiry into the "content, form, and context of a given statement, as revealed by the whole record" to determine whether a public employee's speech had touched on a matter of public concern. *Connick, supra*, 461 U.S. at 148. If it was found not to, the employee's speech would not be balanced against the employer's interests under *Pickering*: "[W]hen an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review" the employee's case. *Id.* at 147. In effect, *Connick* established a threshold test: first a court should determine whether the employee's expression involved a matter of public concern, and only if so should the employee's interests be balanced against those of the employer.

The Courts of Appeals have been sharply at odds for some time over the importation of the *Connick* threshold into the

free association context. The Sixth Circuit has long applied the threshold, as it did in this case. *See Boals v. Gray,* 775 F. 2d 686 (6th Cir. 1985). Very recently, the Second Circuit, after issuing opinions in which it noted the split and described the use of the threshold in association cases as "awkward" and the question as "anything but clear" and "shrouded in uncertainty,"[8] joined the Sixth Circuit on this issue in *Cobb v. Pozzi*, 363 F.3d 89, 102 (2nd Cir. 2004). The Seventh Circuit has applied the *Connick* threshold since 1991. *Griffin v. Thomas*, 929 F. 2d 1210, 1212-1214 (7th Cir. 1991). In its latest cases on this question, however, it has expressed doubts about the correctness of its prior use of the *Connick* threshold and has indicated it may revisit the issue:

> [B]ecause *Connick*'s public concern test grew out of a speech case, it may not appropriately recognize the important distinction between speech and association. This may lead, it can be persuasively argued, to insufficient protection of the associational rights of public employees. Should our approach then to this issue be reexamined? Perhaps. But we think we should wait for a better case than this one to consider a different course.

Balton v. City of Milwaukee, 133 F. 3d 1036, 1040 (7th Cir. 1998).

On the other side of the split, the Fifth and Eleventh Circuits have both unequivocally rejected the *Connick* threshold for free association claims. *Boddie v. City of Columbus*, 989 F. 2d 745, 747 (5th Cir. 1993); *Hatcher v. Board of Pub. Educ. and Orphanage*, 809 F. 2d 1546, 1558 (11th Cir. 1987). The First and Third Circuits have, like the other Courts of Appeals, noted the split, but have found it unnecessary to

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[8] *Melzer v Board of Educ. of the City School Dist. of the City of New York*, 336 F. 3d 185, 196-197 (2d Cir. 2003), cert den. ___ U.S. ___, 124 S. Ct. 1424 (Feb. 23, 2004); *Clue v Johnson*, 179 F. 3d 57, 60 n. 2 (2nd Cir. 1999).

reach the issue in the cases before them. *Tang v. State of R.I., Dept. of Elderly Affairs*, 163 F. 3d 7, 11 n. 4 (1st Cir. 1998); *Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393, 400 (3rd Cir. 1992).

Finally, the Tenth Circuit has applied the *Connick* threshold to a narrow set of hybrid cases in which an employee's speech and association claims are essentially coextensive. It has declined to extend the threshold beyond hybrid claims. *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990).

There are several problems with using the *Connick* threshold in association cases. In brief, it raises the bar too high for First Amendment conduct that has no nexus to the public employer's interests and it does not bridge real-life differences between speech and association.

In all but one of this Court's cases on free speech rights in public employment, the speech act in question addressed the subject of the public employer or else took place in the public workplace. *Pickering, supra; Connick, supra; cf. NTEU, supra.* The nexus between the employer's interests and the First Amendment activity was thus built into the factual situation, as is true for other First Amendment issues in public employment. In anti-nepotism cases the nexus is built into the situation because both of the pertinent employees work in the same enterprise. In anti-patronage cases the nexus requirement is built into the pertinent tests. Here, in contrast, much, if not all, of the conduct in question has no nexus to the employment relationship or the employer's interests—in part because it occurs off-duty and in part because associating with others in various ways is an ongoing, constant part of life, in a way that potentially disruptive comments about a public employer are not.

Furthermore, while in speech cases it is sometimes contentious whether a particular statement involves a matter of public concern, there is at least a discrete statement to be

analyzed. Organizations, however, ". . . deliver many different statements at many different times and places . . ." and it is at the very least "shrouded in uncertainty" which statements are the ones that should be analyzed to determine if the association touches upon a matter of public concern. *Melzer*, 336 F.3d at 196. Because individuals join organizations or associate with other individuals for multiple reasons that shift over time, determining whether a particular association by a particular employee touches on a matter of public concern is often impossible.

The outcome in this case evidences the arbitrary underprotection of associational rights occasioned by adoption of the *Connick* threshold. Even conduct at the core of the First Amendment, such as employees' political discussions with Lewis or Loranger's religious association with her best friend, was not enough to earn the petitioners the weighing of their interests against those of the employer. Had that weighing occurred, there can be little doubt as to the outcome, since it is difficult to identify rights more substantial—or even a scrap of legitimate employer interest on the other side.

As shown by the split in the Courts of Appeal—and the result in this case—there is an urgent need for this Court to clarify the standards at issue.

III. THE COURTS OF APPEALS HAVE SCATTERED OVER THE ANALYSIS OF PUBLIC EMPLOYEES' INTIMATE ASSOCIATION CLAIMS.

In the area of expressive association claims by public employees, the axis of disagreement is clear. Intimate association claims by public employees, on the other hand, have met with implicit and explicit disagreements of several kinds. It is not clear what doctrine animates the analysis; neither is it clear which relationships are protected; nor is it clear what

degree of protection obtains in regard to any given type of relationship; nor is it clear what method or test should guide decisionmaking; nor finally are there stable correlations among these areas of uncertainty. In short, the lower courts have not so much split on questions of intimate associational rights in public employment as they have scattered, among the circuits and to some extent within them as well.

Some courts have located the right of intimate association within the Fourteenth Amendment, and some within the First Amendment. *See, e.g., Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990) (Fourteenth Amendment); *Adler v. Pataki*, 185 F.3d 35 (2nd Cir. 1999) (First Amendment). The Tenth Circuit has required that a public employee allege a specific intent on the employer's part to interfere with the intimate relationship in order to state a claim, bending the analysis sharply in the employer's favor. *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434 (10th Cir. 1990). In addition, the Tenth Circuit evaluates claims on the basis of whether there is "unreasonable governmental interference." *Ibid.* Other courts have adopted a *Pickering* balancing approach. *See, e.g., Shahar v. Bowers,* 114 F.3d 1097 (11th Cir. 1997) (*en banc*), cert. den. 522 U.S. 1049 (1998). The Second Circuit has found it unnecessary to engage in *Pickering* balancing absent some showing of disruption of the employer's operations. *Adler*, *supra,* 185 F.3d at 44-45. The level of uncertainty is partially expressed by the fact that, prior to the Eleventh Circuit's determination that it would apply *Pickering* to intimate association claims, a panel of that circuit discussed the potential application of three utterly distinct tests to a plaintiff's claim that she had been subjected to discrimination because of her marriage—and then declined to select among them, holding that the plaintiff's claim would fail regardless. *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994).

On several occasions some time ago, Justices of this Court noted disagreements in the lower courts regarding the level of constitutional protection available for public employees' intimate relationships. *See, e.g., City of North Muskegon v. Briggs,* 473 U.S. 909 (1985) (White, J., dissenting from denial of petition for writ of certiorari)("The difference between the approaches of these two federal courts is evidence of a broader disagreement over whether extra-marital sexual activity, including allegedly unlawful adulterous activity, is constitutionally protected in a way that forbids public employers to discipline employees who engage in such activity."); *Whisenhut v. Spradlin*, 464 US. 965 (1983) (Brennan, J., dissenting from denial of petition for writ of certiorari) ("Although issues concerning the regulation of the private conduct of public employees arise frequently, the lower courts have divided sharply both in their results and in their analytic approach."). If anything, the disarray in this area has increased since Justices White and Brennan, each joined by other members of the Court, urged consideration of these matters.

These questions cry out for clarification. They involve fundamental emotional commitments and experiences that demand consistent treatment by the law, both for dignitary reasons and to enable informed choices.

Further, the treatment accorded petitioners' intimate association claims by the Sixth Circuit majority cannot be right. The court held that unless the government has essentially extinguished the freedom to marry, all of its employees' intimate associations will be accorded identical and minimal protection. The panel majority's approach conflicts with Sixth Circuit precedent adopting an "undue intrusion" test for assessing a public employee's claim of violated rights of intimate association. *Adkins v. Bd. of Ed. Of Magoffin Cty., KY*, 982 F.2d 952, 956 (6th Cir. 1993). It also conflicts with this Court's instruction that the right of intimate association

exists along a continuum and that constitutional protection for personal associations is not limited to family relationships or to marriage. *Roberts*, *supra,* 468 U.S. at 619-620; *Bd. Of Dirs. Of Rotary Int'l v. Rotary Club*, 481 U.S. 536, 545 (1987); *see also Lawrence v. Texas*, 539 U.S. 558 (2003).

Petitioner Kim Loranger was compelled by the respondents to obtain a preliminary injunction in order to exercise the right to choose her child's godmother. Absent the injunction, she was forbidden from having any contact with that godmother, her closest friend—one of the people in relation to whom she had shaped her own life and self. This prohibition operated despite the uncontested absence of any real-world risks to MDOC's interests. Not every relationship will be entitled to as much deference as that one—and no doubt some, though not many, are entitled to more. But the holding below trivializes virtually the entire range of intimate associational conduct. The Court should grant certiorari in order to clarify the confusion that has resulted in such rulings.

IV. THE COURT SHOULD ESTABLISH A STANDARD TO GOVERN RULES THAT PROSCRIBE A BROAD RANGE OF CASUAL AND HYBRID ASSOCIATION BY PUBLIC EMPLOYEES.

As the Court noted in *Roberts,* different modes of association can overlap. *Roberts,* 468 US at 618. Associational life is both hybridized and dynamic. Greeting a neighbor can lead over time to the formation of a community group opposed to installing a race track across the way or to a lifelong romance. Seemingly casual attendance of a Parent-Teacher Association meeting most often expresses a profound commitment to the experience of one's children.

This hybrid, dynamic quality poses a serious challenge—indeed, an insurmountable challenge—to any broad rule like the one here. At a very basic level, current analysis of asso-

ciational claims focuses on how meaningful or important the association is in one way or another. Thus casual or incidental contact is understood to merit less constitutional protection by virtue of its casualness. However, casual association can lead to or coexist with contact that would clearly be regarded as highly protected.

A sweeping rule like this one must be analyzed under a standard that does not cut those connections short; in the end, any such standard will necessarily invalidate the rule. Without any showing of a real risk of harm, MDOC proposes to stifle and truncate the basic human exchanges that create community and society, that make us who we are.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 01-1383

DAWN AKERS; KIM LARANGER, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Local 6000; AKUA MITCHELL-DAVIS,
Plaintiffs-Appellants,

v.

KENNETH MCGINNIS; ROBERT STEINMAN; MARSHA FORESMAN; PATRICIA CARUSO; JOHN MARSHALL; EDWARD HAGGERTY; GEORGE MARRA; WILLIAM OVERTON; RUTH BARE; FRANK EISENHAUER; JOSEPH JERECKOS; JOHN MAKOWSKI; TERRY PITCHER; KIRK MCVITTIE; GWEN RODGERS, in their Personal and Official Capacities, Jointly and Severally,
Defendants-Appellees.

Argued: Oct. 15, 2002.
Decided and Filed: Dec. 1, 2003.
Rehearing En Banc Denied: Feb. 19, 2004.

OPINION

BOGGS, *Chief Judge*.

Plaintiffs, Dawn Akers and Kim Loranger, a current and a former employee of the Michigan Department of Corrections ("MDOC"), and their union, the United Automobile, Aerospace, and Agricultural Implement Workers of America,

Local 6000 ("UAW"), appeal the district court's summary judgment for the defendants, Kenneth McGinnis, the director of the MDOC, and numerous other listed MDOC administrators. The plaintiffs had sued on the grounds that an MDOC rule ("Rule") that barred all MDOC employees from any non-work-related contact with prisoners, parolees, probationers ("offenders"), their relatives and visitors, violated their "clearly established rights to privacy, association, and due process guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendment to the United States Constitution." Specifically, the plaintiffs sought reinstatement after discharge for violating the Rule, expungement from the plaintiffs' disciplinary records of any reference to a violation of the Rule, and compensatory and punitive damages. On cross-motions for summary judgment, the district court held that the Rule was constitutional and that the defendants enjoyed qualified immunity. Plaintiffs now appeal the holdings that the Rule was not contrary to the freedom of association guaranteed by the First and Fourteenth Amendments and that the defendants enjoyed qualified immunity. We affirm.

I

At all times relevant to this litigation, the MDOC has had a Rule barring employees from "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families." This Rule, originally known as Rule 12, strictly prohibited "improper or overly familiar conduct with [offenders] or their family members or visitors." Violations of the Rule "subject[ed] an employee to disciplinary action up to and including dismissal[ ]." A non-exhaustive list of improper actions included "exchange of letters, money or items, . . . cohabitation [except in case of a pre-existing marriage], being at the home of [an offender] for reasons other than an *official* visit without reporting the visit, . . . giving [offender] [employee's] home telephone number, [and] sexual contact of

any nature." (emphasis in original). Furthermore, the Rule required reporting of "[a]ny contact made with [an offender], or their family member(s), outside the regular performance of an employee's job." In June 1996, Rule 12 was repromulgated as Rule 24. In September 1999, during the course of this litigation, Rule 24 was replaced by a substantially identical Rule 46. Finally, in April 2000, Rule 46 was revised to clarify the definitions of family member and visitor and recognize the power of the MDOC to grant individual employees limited exemptions to the Rule. To receive such an exemption allowing contact with offenders' visitors or family members, but not offenders themselves, an employee would have to submit a misleadingly titled "Offender Contact Exception Request" form and await approval from the Director of the MDOC or a designee. From the creation of the exception procedure to July 23, 2001, 226 such exceptions had been sought and of these 223 had been granted.

Plaintiff Loranger, then a Wayne County probation officer, was contacted by a man she had dated before becoming an MDOC employee and who was then serving a life sentence without parole in a prison outside her jurisdiction. She exchanged several letters with him. When Loranger realized that she was in violation of the Rule, she approached her supervisor about the matter. Four months later, she was terminated for her Rule violation. Plaintiff Akers, while a bookkeeper at a correctional facility in Chippewa County, had befriended a prisoner clerk. Shortly after the prisoner's release, Akers gave him a ride in her car to a job interview. For this violation of the Rule, she also was terminated by the MDOC. Both women had previously been positively evaluated by their supervisors and in neither case is there an allegation that their specific conduct had adversely affected the MDOC's function. Plaintiff UAW represents about two thousand clerical and professional employees of the MDOC,

among them Loranger and Akers. UAW does not represent any prison guards.

In March 1997, the plaintiffs filed a complaint in the United States District Court for the Western District of Michigan and the case was assigned to a magistrate judge. During the following months, labor arbitrators set aside the discharges of both Loranger and Akers and instead imposed relatively brief suspensions on both women. As the plaintiffs had also sought the purging of their disciplinary record of any reference to the Rule violation as well as monetary damages, their reinstatement did not moot the action. After her reinstatement and during the pendency of the case, Loranger repeatedly sought permission to have contact with Rebecca Contreras, a long-standing friend whose son had been placed on probation, and was repeatedly denied. When Loranger became pregnant and wished Contreras to be her child's godmother, she sought and was granted a preliminary injunction ordering the MDOC to allow Loranger to invite Contreras to her child's baptism. Loranger also continued to request permission to have contact with Stacey Artley, a young woman to whom Loranger was a "Big Sister" and who then was on probation. Akers, during the pendency of this action, transferred to a position with the Michigan Department of Natural Resources, mooting her claims for prospective relief. On cross-motions for summary judgement, the magistrate judge issued a report and recommendation, which proposed finding the original Rule to be unconstitutional under the First and Fourteenth Amendments, expunging Akers's and Loranger's disciplinary record, and declaring moot the challenge to the current version of the Rule. However, the district court rejected the report and recommendation and found that there was a live controversy regarding both the current and the old version of the Rule, but also that all versions of the Rule were constitutional, and therefore granted summary judgement to MDOC and qualified immunity to the individual named defendants. Here

the plaintiffs appeal this grant of summary judgment and qualified immunity.

II

The MDOC contends that any challenges to the previous versions of the Rule were mooted when it adopted its current version. However, a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Jones v. City of Lakeland*, 224 F.3d 518, 529 (6th Cir.2000) (en banc) (quoting *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Jones*, 224 F.3d at 529 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Jones*, 224 F.3d at 529 (quoting *Laidlaw*, 528 U.S. at 170, 120 S.Ct. 693). In the present case, as the promulgation of work rules appears to be solely within the discretion of the MDOC, there is no guarantee that MDOC will not change back to its older, stricter Rule as soon as this action terminates. Moreover, as the plaintiffs could be entitled to money damages and the purging of their disciplinary records if the old version of the Rule were found to be unconstitutional even if the current version was constitutional, the issue is not moot and it is incumbent on this court to examine all versions of the Rule. We begin by analyzing the original version of the Rule without the exception procedure.

The plaintiff's claims of constitutional violation are based upon two analytically distinct forms of freedom of association: freedom of intimate association, protected under the

Substantive Due Process component of the Fourteenth Amendment, and freedom of expressive association, protected under the Freedom of Speech Clause of the First Amendment. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). With respect to intimate association, "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." *Ibid.* With respect to expressive association, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* at 618, 104 S.Ct. 3244. As "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case," it is necessary to examine the Rule as a potential infringement of both intimate association and expressive association. *Ibid.*

A

State employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims. *See Boals v. Gray*, 775 F.2d 686, 692 (6th Cir.1985). "Because the analytic tools for adjudicating First Amendment retaliation claims under the Free Speech Clause have been so extensively developed, courts in this and other circuits have tended to import fully that reasoning when litigants have characterized their claims as arising under another First Amendment clause."

Thaddeus-X v. Blatter, 175 F.3d 378, 390 (6th Cir.1999) (en banc). The contours of state employees' freedom of speech in turn are defined by two leading Supreme Court precedents.

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court denied that government employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [institution] in which they work." *Id.* at 568, 88 S.Ct. 1731. But while the Court has long rejected Holmes's famous dictum on the free speech right of government employees,[1] it also concluded "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Court further amplified on this issue.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not

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[1] A policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517 (1892) (Holmes, J.).

> subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Id. at 146, 103 S.Ct. 1684. In general, and outside the area of issues of public concern, the First Amendment provides no greater protection against discipline or discharge to government employees than it does to private employees:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

Id. at 147, 103 S.Ct. 1684. Moreover, the Court cautioned against an overly broad construction of the ambit of the public concern:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 149, 103 S.Ct. 1684.

In *Pickering* and *Connick*, the Supreme Court created a test containing two levels of scrutiny.[2] Restraints on government employee speech, or, as in the present case, government employee association, touching on a matter of public concern must meet the *Pickering* test balancing between the interests of the employee and the interests of the state. We have characterized this test as a "form of intermediate scrutiny." *Montgomery v. Carr*, 101 F.3d 1117, 1129 n. 7 (6th Cir.1996). Restraints on government employee speech, or government employee association, not touching on a matter of public concern, are subject merely to rational basis scrutiny. In either case, it is the court's task to apply the test to the facts. *See Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). This bifurcated test remains the law. The Supreme Court's most recent extensive disquisition on this subject, while providing further instruction on the proper balancing of governmental interests and the interest of government employees to speak on matters of public concern, adopts without further elaboration the *Pickering/Connick* distinction between matters that are of public concern and those which are not. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465-66, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

The question of what speech or association touches on a matter of public concern is by necessity a question for case-by-case adjudication. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 n. 8 (6th Cir.1995) (collecting Sixth

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[2] Plaintiffs also cite some older Supreme Court precedents containing broad and aspirational language regarding the Free Speech rights of public employees. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *United States v. Robel*, 389 U.S. 258, 265-66, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). As these cases cover the same ground as the more recent and specific Supreme Court precedents relied upon herein, we need not here decide the older cases' present vitality.

Circuit precedent concerning what speech is a matter of public concern).

> In general, a matter of public concern is a matter of political, social, or other concern to the community. It is important, however, to distinguish matters of public concern from internal office politics. Federal courts normally do not review personnel decisions reacting to an employee's behavior when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest. The mere fact that public monies and government efficiency are related to the subject of a public employee's speech does not, by itself, qualify that speech as being addressed to a matter of public concern. If the speech is not related to a matter of public concern, we do not evaluate the reasons for the decision.

Jackson v. Leighton, 168 F.3d 903, 909-10 (6th Cir.1999) (internal citations, alterations, and quotation marks omitted). "To determine whether the speech involves a matter of public concern, we look to the content, form, and context of the statements in light of the record as a whole." *Id.* at 910. "Furthermore, the court must determine the point of the speech in question . . . because controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678 (6th Cir.2001) (internal quotation marks, alterations, and citations omitted). The Supreme Court has indicated that the "question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present." *Connick*, 461 U.S. at 143 n. 5, 103 S.Ct. 1684. Few indicia of speech are dispositive. "[A]n employee's speech, activity or association, merely because it is union-related, does not touch on a matter of public concern as a matter of law." *Boals*, 775 F.2d at 693. Nor are statements made privately necessarily outside the reach of the public

concern rule. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). However, government employees' speeches and articles that "ha[d] nothing to do with their jobs and [did] not even arguably have any adverse impact on the efficiency of the offices in which they work," but were made to *public audiences* are deemed to touch on matters of public concern. *Nat'l Treasury Employees Union*, 513 U.S. at 465-66, 115 S.Ct. 1003.

Almost all conceivable association affected by the Rule and all association alleged to have been discouraged by the Rule do not touch on matters of public concern. Loranger wishes to have contacts with an old friend and her "Little Sister." Akers wishes to assist a probationer whom she befriended. While all of these impulses are entirely understandable, even laudable, they are purely private matters of little or no concern to the community as a whole. The plaintiffs also envision hypothetical situations in which they are prevented from contacting a union official who is also related to an offender. But even such hypothetical situations do not rise to the level of public concern because mere individual labor grievances are not matters of public concern. *See, e.g., Connick*, 461 U.S. at 154, 103 S.Ct. 1684; *Boals*, 775 F.2d at 693.

Plaintiffs come closest to alleging interference with an association touching on the public concern when asserting their right to contact a political party official who was also the uncle of an offender. If such association is made for a purpose such as campaigning for public office, it would arguably touch on a matter of public concern. However, a separate line of cases has upheld against constitutional challenge governmental restrictions on public employees' partisan political activities:

> Congress had, and has, the power to prevent [government employees] from holding a party office, working at the polls, and acting as party paymaster for

> other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *see also Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir.1997) (finding no violation of associational or free speech rights when county clerk terminated subordinate who decided to run for the same office). Thus, the actual associations denied to the plaintiffs, as well as hypothetical associations suggested in the plaintiffs' briefs, either do not touch on a matter of public concern, or may be otherwise restrained.

The MDOC easily meets the rational basis test for the non-public association restrained by the Rule.[3] The MDOC has a

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[3] The plaintiffs complain that the MDOC has not here laid out a carefully reasoned defense of the interest underlying the Rule and the relationship between these interests and the Rule. However, under rational basis review, a "profferred explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir.2002) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). The burden is on those who challenge the statute to "negative

legitimate interest in preventing fraternization between its employees and offenders and their families. Given the proven willingness of offenders to break the law, often violently, to reach their ends, on the one hand, and the near-plenary power over offenders entrusted to MDOC employees, on the other, the potential for exploitation of vulnerable offenders by MDOC employees, or vulnerable MDOC employees by offenders, needs no elaboration. The MDOC's interest in preventing such exploitation is only somewhat attenuated in cases where the employee has no direct supervisory authority over the offender. Even clerical workers without any penal authority can by the mere manipulation of paperwork greatly affect an offender's status for better or worse, or at least be pressured into attempting to do so. The inclusion of offenders' visitors and families into the class with whom contact is forbidden may be necessary to prevent the use of third parties to circumvent the ban on direct contact and influence. The MDOC's interest is clearly legitimate, and the Rule is a rational means for advancing the interest. Therefore, the Rule withstands challenge on the basis of freedom of expressive association.[4]

B

The plaintiffs also claim that the Rule interfered with their personal friendships. Personal friendship is protected as an intimate association. *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1214-15 (6th Cir.1995). This court explicated the

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every conceivable basis that might support it." *Craigmiles*, 312 F.3d at 224 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).

[4] This conclusion is also in agreement with the only decision of a sister circuit examining similar polices, even under a heightened standard. *Ross v. Clayton County*, 173 F.3d 1305, 1310-11 (11th Cir.1999) (upholding, under *Pickering* balancing test stipulated to by the parties, Georgia Department of Corrections regulation prohibiting contact between its employees and offenders).

appropriate level of scrutiny for restraints on the freedom of intimate association in *Montgomery*.[5] In that case, we considered a challenge, as contrary the freedom of intimate association, to a school district's rule that barred employees at the same school from marrying. 101 F.3d at 1117-21. We held that a "direct and substantial interference" with intimate association was subject to strict scrutiny, while lesser interferences merely merited rational-basis review. *Id.* at 1124 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383-84, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)).

The contours of a direct and substantial interference with intimate association are illustrated by the case law. A total ban on marriage outside one's ethnic group is a direct and substantial interference. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). So is a requirement on non-custodial parents to obtain court permission before any remarriage. *Zablocki*, 434 U.S. at 387, 98 S.Ct. 673. However, termination of Social Security benefits for a disabled dependent child who marries someone ineligible for benefits is not. *Califano v. Jobst*, 434 U.S. 47, 58, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977). Nor is a Department of Agriculture regulation that treats husband and wife as one person for purposes of calculating farm subsidies, *Women Involved in Farm Econs. v. United States Dep't of Agric.*, 876 F.2d 994, 1004 (D.C.Cir.1989), the Internal Revenue Code's marriage penalty, *Druker v. Comm'r*, 697 F.2d 46, 50 (2d Cir.1982), requiring a citizen-alien couple to fill out a form and submit to an INS interview, *Aguila-Cisneros v. I.N.S.*, 5 Fed.Appx. 415, 2001 WL 223969, at *2 (6th Cir. Feb.27,

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[5] The plaintiffs object to the application of *Montgomery*, characterizing it as a mere anti-nepotism case. However, given that *Montgomery* concerns a restraint on the same freedom of intimate association at issue here, relies to a large extent on the same case law as used by the plaintiffs, and in its reasoning does not depend on the specific features of the anti-nepotism rules, it is a highly relevant precedent.

2001), or termination from employment of a municipal employee who marries another municipal employee, *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703 (6th Cir.2001). From this line of cases, we have abstracted a general rule that we will find "direct and substantial burdens only where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses." *Vaughn*, 269 F.3d at 710 (6th Cir.2001) (citing *Montgomery*, 101 F.3d at 1124-25).

Under these precedents, the Rule is subject only to rational basis review, which—as we explained already—it passes. It does not prevent a large portion of MDOC employees from forming intimate associations; all MDOC employees continue to enjoy the ability to form intimate associations—just not with offenders. Nor are those affected by the Rule absolutely or largely prevented from forming intimate associations with a large portion of the otherwise eligible population. While the plaintiffs stress the large offender population in Michigan, it is only a little over 1% of the state's population. Even if the number of visitors and family members should exceed the number of offenders ten-fold, surely a generous estimate, MDOC employees would only be barred from intimate association with about 10% of the state's population (whereof 9% are subject to routinely-granted exemption under the current Rule). This is far from the absolute bar against marrying a majority of the jurisdiction's population said in *Loving* to be a direct and substantial interference. Moreover, while the bar in *Loving* was absolute, the simple expedient of transferring to another part of the state government or taking employment in the private sector is available to MDOC employees here. In fact, one of the named plaintiffs in this case undertook that step. While a transfer is undoubtedly an inconvenience, it was not found to be a direct and substantial interference in *Montgomery*, nor was even a more serious

employment consequence, termination, found to be such an interference in *Vaughn*.

Amicus curiae American Civil Liberties Union argues that the Rule violates the constitutionally protected freedom of association, not merely of MDOC employees, but also of those not employed by the MDOC, such as family members and visitors of offenders, who would associate with employees but for the Rule. Initially, we recognize that First Amendment "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). To the extent amicus suggests that the Rule should therefore be judged not by the relatively lenient standard for the government-as-employer's interference with private association, but by the more rigorous standard for the government-as-sovereign's interference with private association, it flies in the face of the Supreme Court's and this court's precedent. Any association by definition involves two or more parties and restraining one party from associating will by necessity result in a concomitant effect on the other parties. In this regard, the association between MDOC employees and offenders, their family members, and visitors is no different than almost all other restrictions on association by government employees. Nothing in our precedents indicates that the government only has enhanced authority to regulate association between governmental employees or others over whom it has enhanced authority. To the contrary, to hold as amicus suggest would eviscerate the rule that "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *Nat'l Treasury Employees Union*, 513 U.S. at 465, 115 S.Ct. 1003. *Virginia State Board* is not to the contrary because "[f]reedom of speech presupposes a willing speaker" and the constitutional protections only become effective "where [such] a speaker exists." 425 U.S. at 756, 96 S.Ct. 1817.

Here, the government merely conditions employment on an employee's agreement not to become a willing speaker to or associate with a limited class of persons. The standard of review of such restrictions on employees is the one of *Pickering*, *Connick*, and their progeny.

As there is no dispute that the revised Rule is more lenient than the original Rule, which we upheld above, there is no need to decide whether the Rule is saved by the exemption procedure grafted onto it. If the older Rule is constitutional, *a fortiori* so is the revised Rule. The plaintiffs object to the exemption procedure on the grounds that exemptions are granted purely at the standardless discretion of the MDOC. As we agree with the court below that the Rule was constitutional even in the absence of an exemption procedure, we need not address this issue. However, we note that even were we to conclude that the exemption procedure was necessary to sustain the Rule, this argument would not avail plaintiffs. A discretionary exemption procedure can doom a statute subject to enhanced review under the First Amendment. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (striking down county ordinance giving discretion to administrator in awarding of parade permits); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (striking down city ordinance granting mayor unbridled discretion to permit or prohibit distribution of private newspapers at public news racks); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 962 n. 12, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (striking down statute granting discretion to secretary of state to waive limits on charitable fund-raising expenses); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (striking down city ordinance granting broad discretion to commission to grant or deny parade permits). Here, however, we subject a regulation to rational-basis review. A discretionary exemption procedure

unable to meet the higher standard of review can still meet this highly-deferential one.

Because the Rule is constitutional, the individual defendants enjoyed qualified immunity. "In civil suits for money damages, government officials are entitled to qualified immunity for discretionary acts that do 'not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.' " *Goad v. Mitchell*, 297 F.3d 497, 501 (6th Cir.2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "To determine if qualified immunity attaches, the Supreme Court has delineated a two-part, sequential analysis." *Goad*, 297 F.3d at 501 (citing *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). "First, we inquire whether, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?' " *Goad*, 297 F.3d at 501 (quoting *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Having found no constitutional violation, we must answer the qualified immunity question in the affirmative.

While this disposes of this question, we note that for a plaintiff to defeat a defense of qualified immunity, he must not only prove the violation of a right, but of a *clearly established* right. *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. Indeed, the right must be "so clearly established when the acts were committed that *any* officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." *Dominque v. Telb*, 831 F.2d 673, 676

(6th Cir.1987) (emphasis added). *See also McCloud v. Testa*, 97 F.3d 1536, 1542 (6th Cir.1996) (holding that "individual capacity defendants in § 1983 cases receive some benefit from legal doubt about the clarity of existing law."). However, in the present case the district judge found no violation of a constitutional right at all. Thus, for the plaintiffs to prevail here on the question of qualified immunity, the situation would have to be such that *any MDOC official* when promulgating the Rule would be aware of the fact that it violated the Constitution, but a United States district judge, given the benefit of decades of legal training and practice, years of hearings and adversarial briefings by able counsel, was unable to find such a violation. While such a situation is not logically impossible, and doubtless has occurred from time to time, it certainly must be a very rare one, implicitly casting some doubt on the minimum competency of such a trial judge. Therefore, in cases such as this, unless counsel are prepared to contend that such an extreme and unusual situation occurred, they will not be able to succeed in reversing a grant of qualified immunity.

C

The separate opinion concurring in part and dissenting in part, in contrast to this opinion, the trial court opinions, and all party and amici briefs, analyzes the Rule under the framework of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Under *Turner*, "a *prison regulation* imping[ing] on *inmates'* constitutional rights" will be upheld "if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254 (emphases added).

Under the First and Fourteenth Amendments, associational rights of the general population enjoy the highest level of legal protection against state regulation. However, the state enjoys enhanced powers to regulate association by certain groups. Two such regulable groups are involved here: prisoners, under *Turner* and its progeny, and state employees,

under *Pickering* and its progeny. Moreover, the exercise of associational rights by definition involves more than one party and to regulate one party to an association impinges upon the interests of the other parties. Therefore, the enhanced regulatory power over some groups implies by necessity a power to impinge upon the interests of those who would associate with members of the regulable groups.

The present case concerns an employment regulation affecting association between MDOC employees and a large class of persons, most of whom are not prisoners and over the majority of whom, the relatives and visitors of offenders, the state enjoys *no* enhanced regulatory power. Therefore, in general there is no prisoner nexus, but there always is an employment nexus. As the state's regulatory power springs from the employment nexus, the proper analytical framework is *Pickering*, not *Turner*. Even as far as the Rule is applied against associations between MDOC employees and prisoners, the regulation is valid if it is within the state's power either as an employer or a warden.[6] As we conclude that the state's power as an employer is sufficient to authorize the Rule, an analysis under *Turner* is superfluous, even in that minority of cases where it is applicable.[7] The precedents cited by the separate opinion that apply *Turner* to actions brought by non- prisoners are not to the contrary, because in each case the impinged association or speech was *with* a prisoner. *See*

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[6] To hold otherwise would create the counter-intuitive result that the state has the power to prevent some employee associations only with the general population, but not with prisoners.

[7] The fact that plaintiffs here are employees of the state agency charged with the oversight of prisoners is only marginally relevant. Our analysis would be substantially the same with respect to a regulation affecting other vulnerable state employees. For example, state-employed armored car guards by the same analysis might be barred from associating with offenders, either directly or through offenders' family members or visitors, solely for the purpose of protecting the state's cash and without any alleged penological interest.

Overton v. Bazzetta, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (applying *Turner* to family member's right to visit prisoners); *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (applying *Turner* to publisher's right to send magazines to prisoners); *Keeney v. Heath*, 57 F.3d 579, 581-82 (7th Cir.1995) (applying *Turner* and *Thornburgh* to regulation barring prison guards from marrying prisoners). [8]

At first glance, it may seem strange that the state would have powers to regulate the conduct of its employees, generally law-abiding citizens, in ways that were they exercised over prisoners, generally convicted criminals, would constitute a constitutional violation. Surely any regulation that would under *Turner* violate the Constitution, if applied to prisoners, must *a fortiori* do so if applied to state employees? Yet, that is not always true, because state employee regulations have a lesser constitutional impact than prisoner regulations because they merely place a limited, voluntary burden on the exercise of a right, rather than impose an outright ban. State employment, in contrast to incarceration, is voluntary and while state employees do not waive their constitutional rights, accepting state employment involves a modicum of consent to regulation that is not present for prisoners. Moreover, while punishment for the violation of an employee regulation extends only up to discharge, punishment for the violation of a prisoner regulation extends up

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[8] In one Seventh Circuit case, the court applied *Turner* to an action by a prisoner to enforce the First Amendment right of prison guards to write to the prison review board in support of clemency petitions. *Shimer v. Washington*, 100 F.3d 506, 509 (7th Cir.1996). While we believe that such petitions are more properly analyzed under the framework of *Pickering*, rather than *Turner*, we note that *Shimer* only found standing based on the association between guards and prisoners and based its application of *Turner* on the fact that this underlying association occurred "within prison walls." *Id.* at 508-09. The associations at issue here did not occur within these confines, rendering *Turner* inapplicable.

to lengthened incarceration. For these reasons, some conduct that could not be enjoined or prohibited for prisoners can be for state employees. So for example, the state can extract pledges to support the Constitution from employees and licensees (such as members of the bar), but cannot do so from prisoners.

III

For the foregoing reasons, the district court's judgment is AFFIRMED.

CLAY, *Circuit Judge*, concurring in part and dissenting in part.

The majority applies both the *Pickering/Connick* balancing test and the *Zablocki* "direct and substantial interference" test to Plaintiffs' challenge to various iterations of the MDOC Work Rule. As to the *Pickering/Connick* balancing test, the majority opinion correctly distinguishes between government employee speech that is a matter of public concern and that which is a matter of private concern. Restrictions on the former are subject to "intermediate scrutiny"—a balancing between the interests of the employee and the interests of the government. Private concern speech, by contrast, is subject to rational basis review. Although it is true that this Court has applied the *Pickering/Connick* test to restrictions on associations, *see Boals v. Gray*, 775 F.2d 686, 692 (6th Cir.1985), such an application may not always do justice to the particular associational interests at stake. For example, the right to marry is recognized as a fundamental associational interest. Marriage, however, is purely a matter of private concern. Thus, it receives insufficient protection when applying the *Pickering/Connick* test. *See Balton v. City of Milwaukee*, 133 F.3d 1036, 1039-40 (7th Cir.1998) ("A *Pickering/Connick* balancing test, so useful in resolving public employee free speech cases, is not easily transferable to freedom of association cases. That's because some

associational choices—for instance, whom to marry--are purely private matters. As such, one would think they would usually come up short in a private versus public concern balancing test.") (citation omitted).

As to the *Zablocki* "direct and substantial interference" test, this Court has held that, in the employment setting, strict scrutiny applies to a governmental policy or action that "is a direct or substantial interference" with the asserted associational interest. *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir.1996) (citing *Zablocki v. Redhail*, 434 U.S. 374, 383-84, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)). If the policy or action does not directly or substantially interfere with that interest, then rational basis review applies. *Id.*

The majority is not without a precedential basis for applying these two tests to the associational rights of correctional employees. *See, e.g., Ross v. Clayton County*, 173 F.3d 1305, 1310-12 (11th Cir.1999) (applying *Pickering/Connick* test to correctional officer's claim that his demotion for associating with his probationer-brother violated his First Amendment rights); *Serrano v. Multnomah County*, 64 Fed.Appx. 21, 2003 WL 1827230, at *1 (9th Cir. Apr.7, 2003) (applying *Zablocki* "direct and substantial" test to claim by juvenile group detention worker that her termination for having a personal relationship with a juvenile detainee violated the First Amendment). But the Supreme Court has made it quite clear that prisons are unique to other governmental settings and that, regardless of whether the plaintiffs are prisoners or non-prisoners, there is a single test for the propriety of governmental action that arguably restricts First Amendment rights—the four-factor "legitimate penological interests" test, most recently applied in *Overton v. Bazzetta*, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003). The majority, like the district court below, failed to apply this test to the facts of this case. As a consequence, I

disagree with the majority's reasoning and concur only in part with its judgment.

I.
FACTUAL OVERVIEW

Plaintiffs challenge various iterations of the MDOC Work Rule that prohibits, *inter alia*, non-work-related contact between MDOC employees and inmates, parolees, probationers or their family members and inmates' visitors. This prohibition originally was contained in the MDOC's Work Rule 12. That Rule prohibited "[i]mproper or overly familiar conduct with prisoners, parolees or probationers or their family members and visitors." (J.A. 34.) Violations of the Rule subjected the employee to "disciplinary action up to and including dismissal." *Id.* Examples of improper actions included exchanging "letters, money or items" with a prisoner; living with a probationer or parolee, except where the probationer or parolee was a spouse of the employee and the marriage existed prior to the employment date, or where the spouse became a probationer or parolee after the employment date and the marriage was pre-existing; being at the home of a prisoner, parolee or probationer other than for official business; giving a prisoner the employee's home telephone number; and sexual contact with a prisoner. *Id.* Work Rule 12 also required that "[a]ny contact" with a prisoner, parolee or probationer, or their family members outside of the job be reported to the Warden. (J.A. 35.) Examples of unauthorized contact included contact with a prisoner by writing or by telephone outside of the official work setting and visiting prisoners without authorization.

The MDOC repromulgated Work Rule 12 as Work Rule 24 in June of 1996. Work Rule 24 prohibited MDOC employees from "overly familiar conduct with prisoners, parolees, probationers, family member(s) of a prisoner, parolee or probationer, or visitors." (J.A. 293.) The Rule prohibited

romantic or sexual contact with such individuals as well as "any contact" with such individuals "outside the performance of the employee's job." *Id.* The Rule required the MDOC employee to report "any unavoidable contact" to his or her immediate supervisor. *Id.* The supervisor would then determine whether a written report of the contact should be sent to the employee's warden.[9] Examples of prohibited contact with offenders, their family members or visitors included exchanging "letters, money, telephone numbers or anything," being at the home of any of these individuals for reasons other than official MDOC business and "[n]on-work related contact" with any of these individuals. *Id.* at 294. Any violations of the Work Rule would be grounds for dismissal.

Effective September 17, 1999, MDOC Work Rule 24 was abolished and new Work Rule 46 was implemented. Work Rule 46 defined the term "offender" to mean a "prisoner or parolee under the jurisdiction of the Michigan Department of Corrections or housed in a Department facility, or a probationer who is supervised by an employee of the Department." *Id.* It preserved Work Rule 24's prohibitions against (1) overfamiliarity with an offender, their family members or their visitors; (2) contact with such individuals outside the regular performance of the employee's job; and (3) the duty to report unavoidable contact. The new Work Rule also provided the same examples of prohibited contact, such as receiving letters, money or telephone numbers; being

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[9] Like its predecessor, Work Rule 24 also prohibited the MDOC employee from living with or providing lodging for a prisoner, probationer or a parolee, except for the employee's parents or children or where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. Work Rule 46, which superseded Work Rule 24, relaxed this prohibition by permitting lodging for a sibling. The plaintiffs do not challenge this portion of the Work Rule.

at the home of any such individual other than for official business; and any other non-work-related contact.

On April 24, 2000, the MDOC promulgated a revised Work Rule 46. The revised Rule defined "family member" to mean "parents, stepparents, spouse, children, stepchildren, siblings or step siblings." (J.A. 297.) It also changed the prohibition against contact with a prisoner's visitors to a prohibition against contact with "lead visitors," defined to mean a person on an offender's approved visitors list. *Id.* The revised Rule preserved the prohibition against the provision of lodging for certain offenders and similarly continued to require the reporting of unavoidable contact with offenders, their family members or their visitors. The revised Rule also continued to prohibit "any contact" with an offender outside the regular performance of an employee's job and preserved the various examples of overfamiliarity from the prior Rule (e.g., letter-writing, being at the residence of an offender). The revised Rule somewhat relaxed the prohibition against any contact with an offender's family members or visitors outside of the job by permitting such contact with prior written approval. The Rule omitted language that any violation would be grounds for dismissal, but still appeared to acknowledge that an employee could be discharged for violating the Rule.

In Michigan, there are approximately 13,000 people on parole, 65,000 people on probation and 45,000 people incarcerated. Thus, Work Rule 46 prohibits any non-work-related contact between any of the 17,000 MDOC employees and approximately 120,000 Michigan "offender" residents. There are no clear figures in the record as to how many family members the 120,000 offenders have, but it is estimated to be in the hundreds of thousands.

The MDOC terminated Plaintiff Dawn Akers, a bookkeeping clerk at a correctional facility, pursuant to former Work Rule 24 because she had given a parolee several

rides in her car during her off-duty hours (to the hospital and to Lansing for a job search). Pursuant to former Work Rule 12, the MDOC terminated Plaintiff Kim Loranger, a probation officer, who had written a few letters to an inmate whom she had dated eight years earlier, before the inmate had been incarcerated. Both Plaintiffs have since been reinstated to their employment, however, both seek to have the discipline for violating the Work Rules expunged from their employment records. Plaintiff Loranger and Plaintiff UAW Local 6000 seek to prospectively invalidate the current Work Rule 46.

II.
PLAINTIFFS' CLAIMS AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITIES

A. Legal Standards

In *Overton v. Bazzetta*, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003), the Supreme Court addressed the validity of the MDOC's prison visitation policies which, among other things, limited the visitors a prisoner was eligible to receive. The asserted goal of the regulations was to decrease the total number of visitors because prison officials had found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs. *Bazzetta*, 539 U.S. at —, 123 S.Ct. at 2166. The plaintiffs included prisoners, their friends and their family members. *Id.* The Court acknowledged that "*outside the prison context*, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." *Id.* at 2167 (emphasis added; citations omitted). The challenge to the MDOC's prison visitation policies, however, was "not an appropriate case for further elaboration of those matters." *Id.* The Court reasoned that "freedom of association is among the rights least

compatible with incarceration" and that "[s]ome curtailment of that freedom must be expected in the prison context." *Id.* The Court therefore held that the MDOC's policies did not unduly infringe on the prisoners' rights of intimate association because "the challenged regulations bear a rational relation to legitimate penological interests." *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)).

Although the Court in *Bazzetta* did not separately discuss the standard of scrutiny applicable to the intimate association rights of prisoners' friends and family members, the Court acknowledged that the plaintiffs included friends and family members of prisoners. Moreover, the Court previously had held that the associational rights of non-prisoners are no greater than the rights of prisoners with whom they wish to associate. *See Thornburgh v. Abbott*, 490 U.S. 401, 410 fn. 9, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (holding that the "legitimate penological interests" standard applies to alleged associational infringements on prisoners and non-prisoners alike). Logically, therefore, the "legitimate penological interests" test should apply in this case, where correctional officers, although not prisoners themselves, are integrally related to the prison setting and wish to associate with former inmates and/or inmates' family members. *See Shimer v. Washington*, 100 F.3d 506, 509 (7th Cir.1996) (applying *Thornburgh v. Abbott* to claimed First Amendment right of prison guard to write to a prisoner review board on behalf of prisoners who had filed petitions for clemency); *Keeney v. Heath*, 57 F.3d 579, 581-82 (7th Cir.1995) (applying *Thornburgh v. Abbott* to claimed First Amendment right of prison guard to marry a prisoner without being threatened with termination).

The majority argues that the Work Rule mostly implicates associations with non-prisoners, such as relatives and visitors of offenders. It therefore concludes that the "legitimate

penological interests" test is inapplicable to the Work Rule because "in general there is no prisoner nexus, but there always is an employment nexus." This argument defies common sense and ignores the undisputed facts of this case. The MDOC has sought to justify the Work Rule as it applies to both the offender class and the class of relatives and visitors based *solely* on the Rule's relation to the preservation of prison security. But for the asserted security concerns implicated by MDOC employees' contacts with both classes of individuals, there would be no Work Rule. If, as the majority states, there is "in general no prisoner nexus," then it is difficult to see how the Work Rule survives even rational basis scrutiny. The Work Rule is nothing like employment regulations that require pledges to support the Constitution or preclude moonlighting or partisan political activity, which typically would be based on the employer's general interest in maintaining employee morale or an efficient and loyal workforce. These types of employment regulations are not necessitated by or unique to the prison setting. In contrast, prisoners undeniably are the reason for the MDOC's Work Rule. The fact that the Rule can be classified more generally as an employment regulation should not blind this Court to the specific reality that it is a prison regulation. Accordingly, the "legitimate penological interests" test is not "superfluous," as the majority claims.

The "legitimate penological interests" standard is highly deferential to prison administrators. Although "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining legitimate goals of a corrections system and for determining the most appropriate means to accomplish them," *Bazzetta*, 123 S.Ct. at 2167 (citations omitted), this deference is by no means absolute. Accordingly, the Supreme Court has

provided the following guidance in assessing whether a prison regulation serves legitimate penological interests:

> In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.

Id. (citing and quoting *Turner*, 482 U.S. at 89-91, 107 S.Ct. 2254; internal quotation marks and citation omitted). The party seeking to invalidate the prison regulation bears the burden of proof regarding these four factors. *Id.* at 2168. As discussed below, even under this highly deferential test, parts of the challenged MDOC Work Rule are unconstitutional.

B. Analysis

1. Valid, rational connection to a legitimate governmental interest

Regulations that promote internal security are "perhaps the most legitimate of penological goals," *Bazzetta*, 539 U.S. at—, 123 S.Ct. at 2168 (citation omitted); however, there still needs to be a "logical connection between this interest and the regulations." *Id.* (MDOC's regulations "prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes"). The logical connection between the regulation and the asserted goal cannot be "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90, 107 S.Ct. 2254. Moreover, where "the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion, a closer fit between the

regulation and the purpose it serves may safely be required." *Abbott*, 490 U.S. at 412, 109 S.Ct. 1874; *see also id.* at 416, 109 S.Ct. 1874 ("we are comforted by the individualized nature of the determinations required by the regulation" which prohibited a prisoner from receiving a publication only when the warden determined that it was "detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity") (internal quotation marks and citations omitted).

In *Turner*, the Court found that a prison rule barring inmate-to-inmate correspondence was reasonably related to legitimate security interests. *Turner*, 482 U.S. at 91, 107 S.Ct. 2254. The Court observed, "Undoubtedly, communication with other felons is a potential spur to criminal behavior: this sort of contact frequently is prohibited even after an inmate is released on parole." *Id.* (citation omitted). The Court upheld the regulation because it barred communication only with a "*limited class* of other people with whom prison officials have *particular cause* to be concerned--inmates at other institutions within the Missouri prison system." *Id.* at 92, 107 S.Ct. 2254 (emphases added).

a. Contact with inmates, parolees and probationers

The reasoning in *Turner* easily can be applied to the portion of the challenged MDOC Work Rule that prohibits non-work-related relationships with prisoners or former prisoners. MDOC officials have asserted that any type of non-professional relationship with an offender is cause for discharge because of "serious security concerns in correctional facilities and concerns regarding the integrity of supervision of offenders in communities." (J.A. 215.) (Affidavit of Marsha Foresman, Special Assistant to the MDOC Director, at ¶ 6).[10] I agree, based on *Turner*, that

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[10] *See also* (J.A. 319) (Affidavit of Richard E. Johnson, Assistant Deputy Director of the Correctional Facilities Administration at, ¶ 11) ("I

relationships between MDOC employees and inmates or former inmates could be a spur to criminal behavior or facilitate criminal behavior. Personal relationships with inmates and former inmates, whether romantic or otherwise, could undermine security and order in the prison or the integrity of the probation supervision process. *Cf. Keeney*, 57 F.3d at 581 (holding that a guard's romantic involvement with an inmate could make her "a potential facilitator of unlawful communication between [the inmate] and others and a potential provider of favored treatment for him").

The fact that a particular MDOC employee has no explicit supervisory authority over the offender and may have little or no ability to effect changes to the offender's status does not change the analysis. In establishing prison regulations, "a line must be drawn." *Bazzetta*, 539 U.S. at —, 123 S.Ct. at 2168 (reasonable to limit child visitors by prohibiting visits by nieces, nephews and children as to whom parental rights had been terminated). It is reasonable for the MDOC officials to conclude that (a) the risk to prison security is too great, however remote that risk may be in the vast majority of relationships with offenders; and (b) even innocent relation-

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am aware of several examples of employees who have smuggled contraband into a facility due to the development of a personal relationship with a prisoner. . . ."); (J.A. 223) (Affidavit of Dan L. Bolden, Deputy Director of the Correctional Facilities Administration, at ¶ 8) ("Employees who become involved in [personal] relationships with prisoners are at risk to become involved, often against their will, in bringing contraband into the prison, including money, drugs, and weapons, and assisting in escape plans, plans to create disturbances, or plots to retaliate against staff and other prisoners."); J.A. 217 (Affidavit of Robert Steinman, Deputy Director of the MDOC's Field Operations Administration, at ¶ 5) ("Any appearance of impropriety on the part of the [parole or probation] agent can compromise the employee's authority and control over the probationer and parolee and can result in serious ramifications, ranging from lax and inadequate supervision to actual falsifying of reports and information regarding the individual being supervised.")

ships with offenders tend to undermine offenders' respect for the prison authorities, thereby comprising the authority and control of those MDOC employees who actually supervise them. This Court also cannot ignore the potential administrative costs that the MDOC would incur by having to conduct a case-by-case assessment of relationships with offenders.

For these reasons, I agree with the majority as far as Work Rule 46 legitimately prohibits any non-work-related relationships between MDOC employees and offenders, with one caveat. As presently written, Work Rule 46 prohibits "any contact" with an offender outside the regular performance of an employee's job and further imposes a duty to report any "unavoidable contact" to a superior and potentially to the Warden. (J.A. 298.) As far as potential discipline is concerned, the Rule draws no distinction between intentional contact with an offender outside of work and incidental or even unknowing contact. In this regard, Plaintiffs have complained that MDOC employees could not attend an Alcoholics Anonymous meeting, a political campaign meeting, a religious service, a PTA meeting or a bowling league event if any attendees at those meetings are on parole or probation. *Appellants Br.* at 12. In addition, Michael Devine, a union representative with Plaintiff UAW Local 6000, testified that at one point in time there were twelve homes on his block in which 12 offenders lived. If he were still employed as a probation officer with the MDOC, he could not have any contact with his neighbors. Plaintiffs point out that such contacts would be unavoidable, yet would be cause for termination.

I submit that the Rule is not reasonably related to legitimate penological interests to the extent it prohibits, without exception, certain incidental contacts with probationers and parolees at church functions, political meetings and the like. Probationers and parolees are a significant

percentage of the population, particularly in urban areas. To require MDOC employees to extricate themselves from community events and organizations in which offenders also happen to participate represents a significant intrusion on the employees' personal liberty. Preventing such incidental contacts with offenders bears only the remotest relation to the preservation of prison security and the avoidance of conflicts of interest. *See Turner*, 482 U.S. at 89-90, 107 S.Ct. 2254 (holding that the logical connection between the regulation and the asserted goal cannot be "so remote as to render the policy arbitrary or irrational"). Indeed, the evidence submitted by MDOC in support its Work Rule relates to problems with *personal relationships* between employees and offenders, not to mere *contact* between them. *See* note 2, *supra*. Thus, only when the contact is intentional and repetitive, evolving into a relationship, should MDOC's penological interests even come into play. The lack of a case-by-case exception for such incidental contact confirms the lack of a close fit between the Work Rule's prohibition and the asserted penological interests. *See Abbott*, 490 U.S. at 412, 109 S.Ct. 1874 (where "the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion, a closer fit between the regulation and the purpose it serves may safely be required"). I would hold that the blanket prohibition against incidental contact with probationers and parolees fails the first prong of the *Turner* test.

Further, as currently formulated, Work Rule 46 provides that a MDOC employee can be terminated if he or she attends a church event or a political event also attended by probationers or parolees, even if he or she does not know that any of the attendees are on parole or probation. This "strict liability" approach bears no logical relation to the asserted penological interests of preventing MDOC employees from using their positions to compromise prison security or avoiding conflicts of interest. At a minimum, I would limit the prohibition

against non-work-related contacts with probationers and parolees to situations where the MDOC employee knew or should have known that he or she had contact with such an offender.

b. Contact with family members of offenders and inmates' visitors

The more troubling proposition is whether *Turner* can be interpreted to prohibit contacts or communications with individuals who are not subject to the MDOC's jurisdiction, but who are family members of such individuals. Such family members are a "limited class" in the strictest sense of the term—i.e., there are a finite number of such individuals; however, the size of the class is significant, in the hundreds of thousands. Moreover, because family members are a diffuse class, they likely are not identifiable to MDOC employees in many cases. A MDOC employee would not know that an individual he or she meets outside of work is a family member of an offender; he or she may not become apprised of this fact if the individual never volunteers it. Yet the MDOC employee's job is in jeopardy, regardless of what the employee actually knows or should know about the individual's relationship to an "offender." Thus, the family member classification does not constitute a "limited class" in the sense that the *Turner* Court applied the term to a discrete, relatively small and readily-identifiable group (there, prison inmates who were confined in a single location).

The next question is whether prison officials have "particular cause" to be concerned about such family members. In this regard, the MDOC has submitted an affidavit from Robert Steinman, the Deputy Director of the Field Operations Administration, who is responsible for the

oversight and operation of adult felony probation and parole services. According to Steinman:

> An employee who is involved in other than a professional relationship with a probationer or parolee, or family members of the probationer or parolee, may be persuaded or coerced to misuse his/her position to benefit the parolee or probationer, and/or friends and family of the parolee or probationer. This concern is not limited only to parole and probation agents. Administrative support staff working in field offices and in Central Office are vulnerable as well, having access to may [sic] types of records which can be tampered or altered. For example, administrative support staff may have access to reports of drug testing results regarding parolees and probationers. The employee could, either willingly or under threat, manipulate data and records to change those reports. Other records could be manipulated to affect a probationer or parolee's record of compliance with special conditions, work reports, payment of restitution, etc. An agent could be coerced into using his/her position to gain access to parolees and probationers who are housed in county jails for violations of parole or probation, and even could affect [sic] the release of an individual from county jail under false pretenses. These are just some examples of improper use of position which can result from non-professional relationships between employees and parolees, probationers, and their families.

(J.A. 217-18) (Steinman Aff. at ¶ 6).

No doubt the MDOC has identified some conceivable harms that a compromised MDOC employee could inflict on the correctional system. Arguably, the risk of at least some of these harms being facilitated by former inmates who strike up relationships with MDOC employees is "self-evident." *Cf. Bazzetta*, 539 U.S. at —, 123 S.Ct. at 2168 (MDOC's regulations "prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining

prison security and preventing future crimes"). But the risk of harm, although conceivable, is not self-evident in the case of family members of offenders and inmates' visitors, who, as far as anyone knows, are and have always been upstanding citizens. By definition, family members and visitors are not offenders. Unless they have been found guilty of a crime outside of Michigan, family members and visitors have not been "convicted of felonious behavior, which often involves dishonesty, fraud, and coercion." (J.A. 219) (Steinman Aff. at ¶ 9). Indeed, the MDOC has not cited a single example of a MDOC employee using his or her position to carry out, whether willingly or under duress, any improper favors for family members or visitors. Thus, the MDOC has not based its prohibition against relationships with family members or visitors on "particular cause," but on "questionable speculation" that such contacts conceivably could threaten prison security. *Cf. California First Amendment Coalition v. Woodford*, 299 F.3d 868, 880 (9th Cir.2002) (regulation that barred outsiders from witnessing administration of lethal injection was not justified by alleged interest in protecting execution team members from being publicly identified and subjected to retaliation; evidence in the record showed that regulation was an "overreaction, supported only by questionable speculation"); *see also Shimer*, 100 F.3d at 510 ("We . . . are reduced to speculation when not provided with evidence, and, having speculated, find it difficult to establish a connection between the prison administration's unsubstantiated justifications and its policy of prohibiting correctional employees from contacting the Prisoner Review Board on behalf of prisoners.").

For these reasons, the former Work Rule's blanket prohibition on contact with family members of offenders and inmates' visitors is unconstitutional. Although the revised Work Rule now permits such contacts with prior written approval from the prison authorities, the Rule provides absolutely no standards to guide prison administrators in the

exercise of their discretion. I would direct the MDOC to a Federal Bureau of Prisons regulation on visitation by friends and associates which, by analogy, strongly suggests that incorporating specific standards into the MDOC's family member/visitor exception is feasible. According to that regulation:

> The visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution. Exceptions to the prior relationship rule may be made, particularly for inmates without other visitors, when it is shown that the proposed visitor is reliable and poses no threat to the security or good order of the institution.

28 C.F.R. § 540.44(c). *See also Abbott*, 490 U.S. at 416, 109 S.Ct. 1874 ("we are comforted by the individualized nature of the determinations required by the regulation" which prohibited a prisoner from receiving a publication only when the warden determined that it was "detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity") (internal quotation marks and citations omitted). Applying a standard like "reasonable threat to security and good order" would serve to focus the MDOC on concrete criteria that specifically relate to its interest in maintaining prison security, making it less likely that the MDOC would render, or create the appearance of, arbitrary determinations that have nothing to do with its penological interests.

To summarize, the revised Work Rule 46 is reasonably related to a legitimate penological interest to the extent it prohibits relationships between MDOC employees and inmates, probationers or parolees, but not to the extent it bars incidental or unknowing contact with such individuals. The Rule is not related to a legitimate penological interest to the

extent it (a) prohibits unknowing or incidental contact with family members of offenders or inmates' visitors and (b) prohibits contact with family members or inmates' visitors, subject only to a case-by-case exception that fails to take into account prison security, or any other factor.

2. Alternative means of exercising associational rights

When examining prison regulations, "[w]ere it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable." *Bazzetta*, 539 U.S. at—, 123 S.Ct. at 2169. Here, Plaintiff Loranger complains that Work Rule 46 prevents her from visiting with Rebecca Contreras, her closest friend for the past 15 years, because Contreras' son is on probation. Likewise, the Rule has prevented Contreras from participating in Loranger's childbirth, attending the baptism of Loranger's child and actively serving as the Godmother of Loranger's child. Although Loranger requested permission to have contact with Contreras, the MDOC denied her request. Plaintiffs also complain generally that the Rule prohibits MDOC employees from attending Alcoholics Anonymous meetings, political campaign meetings, religious services and PTA meetings, when any attendees at those meetings are on parole or probation.

Alternative means of participation in these associational activities exist only if Plaintiffs leave their employment with the MDOC (an alternative the majority cavalierly calls a "simple expedient"). But because the challenged prison regulations are unreasonable, Plaintiffs are not required to quit their jobs to enjoy these rights. *Compare Keeney*, 57 F.3d at 581-82 (holding that prison work rule that forbade social involvement with inmates did not impermissibly burden prison guard's right to marry by forcing her to quit in order to marry an inmate; regulation served "plausible" concerns of prison in avoiding conflicts of interest and the appearance of favoritism). Rather, the question is whether, *as MDOC*

employees, Plaintiffs have alternative means of carrying out their otherwise-protected associational activities without fear of being terminated. Clearly, they do not. They are absolutely prohibited from engaging in any associational activities that result in incidental or unknowing contact with probationers and parolees. Additionally, subject only to the unfettered discretion of prison officials, MDOC employees are prohibited from contact with offenders' family members and inmates' visitors, with whom they may have had long-standing, pre-existing personal relationships.

3. Impact of accommodation on prisoners, guards and resources

Any alternative to the MDOC regulations must avoid a "significant reallocation of the prison system's financial resources [that] would impair the ability of corrections officers to protect all who are inside a prison's walls." *Bazzetta*, 539 U.S. at—, 123 S.Ct. at 2169. Only when the proposed alternative "will have a significant 'ripple effect' on fellow inmates or on prison staff, [should courts] be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90, 107 S.Ct. 2254 (citation omitted).

It appears that there would little, if any, reallocation of prison resources if this Court were to require the MDOC to create an exception for unknowing or incidental contact with probationers and parolees. The MDOC already has adopted a case-by-case exception procedure for contacts with family members of offenders and inmates' visitors, which by all estimates, constitute a far greater population than the probationer/parolee population. There is no indication in the record that the adoption of this exception would result in a crush of requests from MDOC employees. As noted above, there is no evidence that such incidental or unknowing contacts would pose a threat to prison security.

Furthermore, there would be no effect on prison resources as a result of requiring the MDOC to apply specific standards to its current policy of granting case-by-case exceptions to the prohibition against contact with offenders' family members and with inmates' visitors. In fact, the MDOC is likely to save resources by following uniform standards that do not have to be re-invented each time a request is submitted. In addition, by incorporating the concept of prison security into the standards, the MDOC's legitimate penological interests would be advanced.

4. Ready alternatives to the regulations

The "existence of obvious, easy alternatives [to prison regulations] may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90, 107 S.Ct. 2254. Although this factor is not a "least-restrictive-means" test, *id.*, prison regulations are unreasonable if there is "some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Bazzetta*, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed.2d 162 (citing *Turner*, 482 U.S. at 90-91, 107 S.Ct. 2254).

As discussed in the preceding section, there are obvious regulatory alternatives that fully accommodate the MDOC's interest in preserving prison security and avoiding conflicts of interest in the context of contacts with parolees, probationers, family members of offenders and visitors. The creation of an exception for incidental or unknowing contact with parolees and probationers, as well as the institution of specific standards for contacts with family members of offenders and visitors would impose a *de minimis*, if any, cost on the MDOC; even under the present version of Work Rule 46, the MDOC is incurring the cost of case-by-case determinations about the permissibility of contacts with family members and visitors. Without these common-sense modifications, Work

Rule 46 is an exaggerated—indeed, ridiculous--response to the MDOC's legitimate concern over maintenance of prison security.

Based on the foregoing, I concur that the grant of summary judgment to the MDOC on Plaintiff Akers' and Plaintiff Loranger's claims was appropriate. It is undisputed that both Akers and Loranger had purposeful contacts with a parolee in violation of former Work Rule 24 (Akers) or with an inmate in violation of former Work Rule 12 (Loranger). Thus, disciplinary action against them did not violate their constitutional right to freedom of association. Nevertheless, Plaintiff Loranger and Plaintiff UAW Local 6000 are entitled to a declaration that the revised Work Rule 46 is unconstitutional to the extent it imposes discipline for: (1) unknowing or incidental contact with offenders, family members of offenders or inmates' visitors or (2) contact with family members of offenders or inmates' visitors, subject only to a standardless exception process.

III.
QUALIFIED IMMUNITY

Since neither Akers nor Loranger suffered a constitutional harm stemming from their discipline for violating the Work Rules, the individual Defendants are entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."). Regardless, there appears to be no basis to find that the right of prison employees to engage in particular associational activities with probationers or parolees was "clearly established," *id.*, given the dearth of case law applying the four-part *Turner* test to the regulation of employment conditions in a prison setting. Accordingly, I concur with the majority's judgment that Defendants were

entitled to qualified immunity to the extent they were sued in their individual capacities.[11]

IV.

CONCLUSION

For the foregoing reasons, I CONCUR that the district court properly granted summary judgment on Plaintiff Akers' and Loranger's claims for unconstitutional discipline. I also CONCUR in the majority's judgment that the individual Defendants are entitled to qualified immunity. I DISSENT to the extent the district court should have granted Plaintiff Loranger and UAW Local 6000's request for prospective relief regarding certain aspects of Work Rule 46. Work Rule 46 legitimately bars non-work-related relationships between MDOC employees and offenders, but the prohibition against all non-work-related contact with probationers and parolees should be limited to situations where the MDOC employee knew or should have known that such individuals were offenders. The prohibition also should contain an exception for incidental contact with such offenders. Work Rule 46 also is unconstitutional to the extent it bars (a) any unknowing or incidental contact with family members of offenders or inmates' visitors and (b) permits such contacts, subject only

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[11] I do take issue with the majority's statement that Defendants are entitled to qualified immunity because "a United States District Court Judge, given the benefit of decades of legal training and practice, years of hearings and adversarial briefings by able counsel, was unable to find . . . a violation." With all due respect, my brethren in the district courts have been known to commit legal error, including plain error through the failure to cite and apply clearly established legal precedent. If a district judge's opinion of the state of the law were somehow dispositive of the qualified immunity issue, the Courts of Appeals rarely would have occasion to reverse a district judge's ruling on qualified immunity. Thus, whether a district judge failed to find a constitutional violation should not control this Court's analysis of the issue.

to the MDOC's unfettered discretion to make exceptions without reference to any factors related to prison security, order or discipline.

352 F.3d 1030, 20 IER Cases 1089

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1383

[Filed Dec. 1 2003]

DAWN AKERS; KIM LORANGER; UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 6000; AKUA MITCHELL-DAVIS,

Plaintiffs-Appellants,

v.

KENNETH L. MCGINNIS; ROBERT STEINMAN; MARSHA FORESMAN; PATRICIA L. CARUSO; JOHN MARSHALL; EDWARD HAGGERTY; GEORGE MARRA; WILLIAM OVERTON; RUTH BARE; FRANK EISENHAUER; JOSEPH JERECKOS; JOHN MAKOWSKI; TERRY PITCHER; KIRK MCVITTIE; GWEN RODGERS, in their Personal and Official Capacities, Jointly and Severally,

Defendants-Appellees.

Before: BOGGS, *Chief Judge*; and SUHRHEINRICH and CLAY, *Circuit Judges*.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY THE ORDER OF THE COURT

/s/ LEONARD GREEN,
LEONARD GREEN
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1383

[Filed Feb. 19, 2004]

DAWN AKERS, *et al.*,
Plaintiffs Appellants,

v.

KENNETH L. MCGINNIS, *et al.*,
Defendants-Appellees.

BEFORE: BOGGS, *Chief Judge*; SUHRHEINRICH and CLAY, *Circuit Judges*.

The court having received a petition for rehearing en banc, and the petition having being circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN,
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Feb. 23, 2001]

Case No. 2:97CV-325
HON. GORDON J. QUIST

DAWN AKERS, *et al.*,

Plaintiffs,

v.

KENNETH MCGINNIS, *et. al.*,

Defendants.

OPINION

Plaintiffs filed this claim on December 1, 1997, requesting monetary, injunctive, and declaratory relief against Defendants Michigan Department of Corrections (MDOC) and its officials. On July 17, 1998, the Court referred this matter to a Magistrate Judge for recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). The parties filed cross motions for summary judgment. On November 2, 2000, the Magistrate Judge issued a Report and Recommendation recommending this Court find prior MDOC Rule 46 ("Old Rule 46") unconstitutional and that no controversy exists as to MDOC's revised Rule 46 ("Revised Rule 46").[1] The

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[1] Plaintiffs were initially cited for violating Rule 12 or its June 1996 replacement, Rule 24. Rule 24 was replaced by Old Rule 46 on September 17, 1999. Old Rule 46 was replaced by Revised Rule 46 on April 24, 2000. (Rules 12, 24, Old Rule 46, and Revised Rule 46, collectively, "the Rules.") In any event, the effect of all the Rules was the same, namely, to prohibit contact outside of work between MDOC employees and pro-

Magistrate Judge recommended that Plaintiffs' motion for summary judgment be granted in part and denied in part and that Defendants' motion for summary judgment be denied. The Magistrate Judge recommended (1) that this Court hold Old Rule 46 to be an unconstitutional infringement upon Plaintiffs' First Amendment rights of association, and (2) that this Court hold that there is no case or controversy regarding Revised Rule 46. The Report and Recommendation was duly served on the parties. The Court has received objections from the Defendants. Plaintiffs filed a motion for reconsideration which will be construed as objections to the Report and Recommendation.

Defendants object to the Magistrate Judge's Report and Recommendation that Old Rule 46 is unconstitutional. The Defendants request this Court to affirm the Magistrate Judge's Report and Recommendation dismissing the challenge to Revised Rule 46 as moot. Plaintiffs object to the Magistrate Judge's holding that the challenge to MDOC's Revised Rule 46 does not present a case or controversy.

In accordance with 28 U.S.C. § 636(b)(1), and L.Civ.R. 72.3(b), the Court has reviewed *de novo* those portions of the Report and Recommendation to which objection has been made.

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bationers, parolees, prisoners, their family members and visitors. Revised Rule 46, unlike all previous Rules, provides that employees may have contact with the family members or visitors of an offender if MDOC gives written permission to do so. This exception makes no difference in this Court's analysis, which applies equally to all the Rules (Rules 12 and 24 are at issue because they served as the basis for the terminations of Akers and Loranger; Old Rule 46 and Revised Rule 46 are at issue because their continued application to Plaintiffs has been challenged throughout the trial).

I. Facts

The facts are adequately set forth in the Magistrate Judge's Report and Recommendation. This Court adopts the portion of the Magistrate Judge's Report and Recommendation setting forth the facts of this case.

II. Discussion

A. *Mootness.*

The Magistrate Judge ruled that there was no case or controversy regarding the constitutionality of Revised Rule 46. Plaintiff Local 6000 has from the start of this litigation alleged ongoing violations of the Rules, which would include Revised Rule 46. In addition to alleging ongoing violation of the Rules in its complaint, in supplemental materials filed with this Court following the Magistrate Judge's latest Report and Recommendation, Local 6000 has alleged further continuing discipline and effects under Revised Rule 46. Ms. Loranger, herself a member of Local 6000, has submitted a supplemental declaration detailing Revised Rule 46's effect on her relationship with Stacey Artley. The fact that Ms. Loranger has not sought an exception under Revised Rule 46 is irrelevant, since no exception is provided under that rule for contact with actual offenders.[2]

This Court finds that a case and controversy relating to Revised Rule 46 exists.

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[2] Other than as provided in Rule 26, which is not applicable to Ms. Loranger's situation.

B. *The Test Applicable To The Work Rules.*

The Magistrate Judge applied a balancing test to recommend that this Court find Old Rule 46 unconstitutional. Defendants' Objections are confusing in that Argument I is entitled:

> PRIOR WORK RULE 46 IS CONSTITUTIONAL BECAUSE THE MDOC'S INTEREST IN PROTECTING THE PUBLIC AND ITS EMPLOYEES OUT WEIGHS THE PLAINTIFFS' ASSOCIATIONAL RIGHTS.

(Defs.' Objections to Report and Recommendation at 2.) Despite this heading, Defendants argue that "this Court should apply the rational. basis test to the prior rule." (*Id.* at 5.) Under *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), this Court believes that Defendants have a very good argument that the rational basis test should apply. Nevertheless, this Court would reach the same ultimate conclusion whether it used the rational basis test or a more restrictive balancing test. Therefore, a balancing test will be applied in this Court's analysis.

C. *Balancing Plaintiffs' and Defendants' Rights.*

The Supreme Court has stated that "[t]he key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 675, 114 S.Ct. 1878, 1888 (1994). For this reason, the Supreme Court has "'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'" *Bd. of County Comm'rs. Wabaunsee County v. Umbehr*, 518 U.S. 668, 676, 116 S.Ct. 2342, 2348 (1996) (quoting *Waters*, 511 U.S. at 673,114 S.Ct. at 1887). The

Magistrate Judge cited a long quote from *McCabe v. Sharrett*, 12 F.3 d 1558, 1571 (11th Cir. 1994), a portion of which is recited here:

> Where loyalty to an employer and the ability to keep confidences are essential to the proper performance of public functions, the public employer's interest will weigh heavily if the employee's exercise of the right would compromise loyalty and confidentiality, because restricting those rights may be necessary to preserve the employer's interest in effective office functioning. *See Pickering*, 391 U.S. at 570, 88 S.Ct. at 1735; *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *see also McDaniel v. Woodward*, 886 F.2d 311, 315 (11th Cir. 1989). For this reason, "[w]hen close working relationships are essential to fulfilling public responsibilities," the Court has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 at 151-52, 103 S.Ct. at 1692; *Goffer*, 956 F.2d at 1049.

This case does not involve elementary school teachers or even police officers. It involves state employees who, on a daily basis, engage with the most dangerous and manipulative people in the State of Michigan. They deal with forgers, embezzlers, con artists, rapists, murderers, etc. There is no doubt but that MDOC has a clear interest in enforcing a policy which limits contact between its employees and inmates, parolees, probationers, and their families and visitors. It has also clearly stated the reasons for its policy in affidavits attached to its motion for summary judgment. If an employee has a personal relationship with a prisoner, parolee, probationer, or his/her family or visitors, that employee may subjected to entreaties and ultimately be persuaded to misuse his or her position to help the prisoner, parolee, or probationer. Such actions could take the form of altering prison records, showing favoritism, intervening on behalf of favorites, granting privileges, or smuggling contraband into the

facility. (Johnson Aff. ¶¶ 6-9, 11, Defs.' Mot. Summ. J. Ex. 1; Steinman Aff. ¶¶ 5-8, 10, Defs.' Mot. Summ. J. Ex. 2.) Even if nothing illegal occurred, contacts with these individuals by MDOC employees can lead to an appearance of impropriety or favoritism which hinders MDOC's fulfillment of its mission. (Steinman Aff. ¶ 5.) Potential problems are not confined to those with direct authority over prisoners, parolees, or probationers. Administrative staff, teachers, and food service workers also potentially could cause disruptions. (Johnson Aff. ¶ 7; Steinman Aff. ¶ 6.) These consequences could lead not only to general inefficiency in MDOC, but to danger to prisoners, employees, and the public. (Johnson Aff. ¶¶ 8-9; Steinman Aff. ¶¶ 7-8.) MDOC's concerns are not only justified, but based on actual occurrences which have caused problems for MDOC (Johnson Aff. ¶ 11; Steinman Aff. ¶ 10).

MDOC consequently has a strong interest in prohibiting contact between offenders, their family and visitors, and its employees. It could not run an efficient and safe operation without prohibiting most of such contact. MDOC predicts problems if it is not allowed to prohibit such contact, and this Court defers to this reasonable assessment of MDOC's situation. *See Bd. of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 676, 116 S.Ct. 2342, 2348 (1996); *cf. Waters*, 511 U.S. at 677,114 S.Ct. at 1889 ("we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be without considering the reasonableness of the employer's conclusions"). Such deference is appropriate because, in part, one of MDOC's interests "as a public service provider [is] its interest in being free from intensive judicial supervision of its daily management functions." *Umbehr*, 518 U.S. at 678,116 S.Ct. at 2349.

Balanced against this strong state interest are Plaintiffs' First Amendment associational rights. Plaintiffs are and have been prohibited from contact with various individuals with

whom they desire contact. These include close, long-time friends. These associations are, however, primarily social, and social relationships are often fluid—they ebb and flow. The court has before it no justiciable instances where Plaintiffs are currently prohibited by the Rules from contact with their own intimate family members—spouse, parent, or child. Plaintiff Loranger's "Big Sister" relationship with Ms. Artley, which may be honorable, can also be dangerous from the MDOC's point of view—precisely because Ms. Loranger has so much time and emotion invested in Ms. Artley. While this Court is sympathetic, even this relationship does not overcome the MDOC's very compelling interest. Persons who are incarcerated or on probation almost always must give up social and even family relations, and their families must often give up these relationships with them. The relationship with an incarcerated person is,. at least, almost always diminished.

Nor does this Court believe that, in the circumstances of this case (which do not involve intrusion by the MDOC into the intimate familial relationships of Plaintiffs), the First Amendment requires the MDOC to closely examine every case in which an employee desires contact with an offender or the offender's family or visitors. Forcing MDOC to make a particularized, individual determination as to every such desired contact—and then facing judicial review of such decisions—would, in the circumstances alleged in this case, lead to precisely the type of judicial intervention in MDOC's day-to-day affairs that the Supreme Court has advised should not be undertaken. See Umbehr, 518 U.S. at 678, 116 S.Ct. at 2349. MDOC should not face litigation every time it prohibits an employee from contacting an offender or the offender's family or visitors. MDOC should be allowed to focus its attention on operating a safe and effective prison and parole system, not upon continually defending its every employment decision in the courts.

Plaintiffs' First Amendment rights cannot be ignored; but neither can MDOC's need to carry out its statutory mission. MDOC's interests in this case outweigh those of Plaintiffs. This conclusion is reached after giving an appropriate level of deference to MDOC's reasonable predictions of harm, though the conclusion would be the same were no deference given to MDOC's predictions. In this Court's judgment, the Rules are constitutional, and MDOC may enforce Old Rule 46 and continue to enforce Revised Rule 46.

III. Conclusion

MDOC employees' rights of association are outweighed by the interests of MDOC in running a safe and effective prison system. The Rules are constitutional. Plaintiffs' motion for summary judgment will be denied. Defendants' motion for summary judgment will be granted.

An order consistent with this opinion will be entered.

Dated: Feb. 22, 2001.

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Feb. 23, 2001]

Case No. 2:97-CV-325
HON. GORDON J. QUIST

DAWN AKERS, *et al.*,
Plaintiffs,

v.

KENNETH MCGINNIS, *et al.*,
Defendants.

ORDER

In accordance with the Opinion filed on this date.

IT IS HEREBY ORDERED that this Court DECLINES TO ADOPT the Report and Recommendation of the Magistrate Judge (docket no. 78) as the Opinion of this Court.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (docket no. 73) is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (docket no. 75) is GRANTED.

The Clerk shall enter judgment for the Defendants.

This case is closed.

Dated: Feb. 22, 2001

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Feb. 23, 2001]

Case No. 2:97cv325

DAWN AKERS, *et al.*,

v.

KENNETH MCGINNIS, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ Decision by the Court. This action is before the Court on objections to a Report and Recommendation filed by the Magistrate Judge on October 11, 2000. The issues have been reviewed de novo and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgments is GRANTED.

Clerk of Court

Melva I. Ludge
(By) Deputy Clerk

Date: February 23, 2001

APPENDIX G

UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Oct. 11, 2001]

Case No. 2:97-cv-325
HON. GORDON J. QUIST

DAWN AKERS, *et al.*,

Plaintiffs,

v.

KENNETH MCGINNIS, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

When this action was filed in 1997, plaintiffs Dawn Akers, Kim Loranger and Akua Mitchell-Davis were employees of the Michigan Department of Corrections (MDOC) who had been discharged for violating Rule 46 entitled "Improper Relationship: Romantic, Sexual, Shared Residence, Unauthorized, or Overly Familiar Contact." This rule prohibited employees of the MDOC from having contact with prisoners, parolees, probationers, or the family members of prisoners, outside the regular performance of the employee's job. All three plaintiffs challenged their discharge and were reinstated following arbitration proceedings. In this civil action, plaintiffs sought monetary damages and equitable relief. By Opinion and Order of January 14, 1999, this Court dismissed plaintiffs' claims for monetary damages, finding that defendants were entitled to the defense of qualified immunity. Plaintiffs' claims for equitable relief remain.

Plaintiff Loranger intended to have her child baptized and wanted Rebecca Contreras, a long-time friend, to act as the godmother for her child. Ms. Contreras has an adult son who was on probation in Macomb County. A Report and Recommendation was issued on November 2, 1999, recommending that Ms. Loranger's motion for a preliminary injunction be granted. Defendants did not file any objections to the Report and Recommendation, and an order was entered on November 24, 1999, granting plaintiff Loranger's motion for injunctive relief. The MDOC then promulgated a revised Rule 46. Presently before the Court are cross-motions for summary judgment.

Plaintiffs assert that the revised rule is unconstitutional. Defendants assert that the revised rule is constitutional. Plaintiffs Akers and Loranger request a declaratory judgment that the MDOC improperly disciplined them for past violations of Rule 24.[1] Plaintiff Akua Mitchell-Davis asserts her claim is now moot and will stipulate to dismissal from this action without prejudice.

MDOC Assistant Deputy Director (ADD) Richard E. Johnson stated in his affidavit, attached to defendants' motion for summary judgment, that an employee who has a non-professional relationship with a prisoner compromises control and authority over that prisoner and other prisoners. The employee might be persuaded or coerced to misuse his position to benefit a prisoner. ADD Johnson attested that Rule 46 is essential to the maintenance of security and good order in the correctional facilities. MDOC Deputy Director Robert Steinman attested that the Rule is essential to the integrity and security of any correctional facility. Employees could be coerced to misuse their positions to favor prisoners. An

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[1] Initially, plaintiffs were cited for violating Rule 12, or its June 1996 replacement, Rule 24. Rule 24 was replaced by Rule 46 on September 17, 1999. Revised Rule 46 replaced Rule 46 on April 24, 2000.

employee could manipulate a prisoners records or even gain release of a prisoner through false pretenses. There is a risk that an employee may become involved in smuggling contraband into the prison or be subjected to coercion or blackmail by members of the community.

The parties have filed cross motions for summary judgment. Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the respondent must demonstrate by affidavits, depositions, answers to interrogatories; and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The respondent cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). While the evidence must be viewed in the light most favorable to the nonmoving party, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. *See also Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); *cf. Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

Plaintiffs request that the court declare the prior Rule 46 unconstitutional. The prior Rule 46 which caused plaintiffs to file this lawsuit provided:

> 46. SEXUAL MISCONDUCT, SEXUAL HARASSMENT OR OVERFAMILIARITY
>
> *Definitions for use with this rule*:
>
> "Sexual Misconduct": engaging in or attempting to engage in a sexual act or the intentional touching of genitals, anus, groin, breast, inner thigh or buttocks with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person. This also includes indecent exposure.
>
> "Sexual Harassment": engaging in sexual advances, requests for sexual favors, and other offensive verbal or physical conduct of a sexual nature. This includes verbal conduct of a gender-related nature intended to humiliate, harass, degrade or arouse.
>
> "Overfamiliarity": conduct which has or is likely to result in intimacy, a close personal or non-work related association.
>
> "Facility": any property owned or leased by the Michigan Department of Corrections.
>
> *Work Rule Content*:
>
> Employees are prohibited from:
>
> —engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.
>
> —engaging in overfamiliarity with an offender, their family member(s) or their visitors.
>
> Employees are further prohibited from retaliating against any person who reports such behavior. Except as required to comply with Department policy, employees

shall not disclose to another person, including an employee or an offender, that such a report has been filed, the details of the report and/or the status of any investigation.

An employee shall not make any contact with an offender or their family member(s) or their visitor(s) outside the regular performance of the employee's job. If any unavoidable contact is made, such contact must be reported verbally to the employee's immediate supervisor by the end of the employee's next regularly scheduled workday. The supervisor will determine whether the contact warrants a written report, and if so determined, a copy will be sent to the employee's Warden, Field Operations Administration Regional Administrator, or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for, an offender, except for an employee's parents, step-parents, children, step-children, siblings, or step-siblings or spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where lodging is provided, this must be immediately reported to the employee's Warden, Field Office Administration Regional Administrator or Central Office Administrator, as applicable.

Examples of overfamiliarity which are prohibited by this rule include, but are not limited to:

—Giving or receiving letters, money, telephone numbers or anything else that is not authorized by policy to or from an offender, their family member(s), or a visitor.

—Being at the home of an offender, their family member(s), or their visitor(s) for reasons other than official Department business.

> —Non-work related contact or visits with an offender, their family member(s) or their visitor(s) without authorization.
>
> Any violations of this rule will be grounds for dismissal. Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. Department staff who are discharged for violation of this rule or who resign in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department of Corrections.

For those reasons stated in my November 2, 1999, Report and Recommendation, the previous Rule 46 was, in my opinion, unconstitutional. The United States Supreme Court explained in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

> [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *See, e.g., NAACP v. Claiborne-Hardware Co.*, 458 U.S. 886, 907-909, 932-933, 102 S.Ct. 3409, 3422-3423, 3436, 73 L.Ed.2d 1215 (1982); *Larson v. Valente*, 456 U.S. 228, 244-246, 102 S.Ct. 1673, 1683, 1684, 72 L.Ed.2d 33 (1982); *In re Primus*, 436 U.S. 412, 426, 98 S.Ct. 1893, 1901, 56 L.Ed.2d 261 (1977).

Id. at 622. The Supreme Court has recognized a "zone of privacy" which has gained constitutional protection. The Supreme Court has indicated that only "fundamental" rights

are within this zone. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). The Court has not fully explained the extent and nature of the interests protected under the "zone of privacy." The types of rights protected by this "zone of privacy" have related primarily to personal decisions concerning "marriage, . . . procreation, . . contraception, . . . family relationships, . . . and child rearing and education." *Roe v. Wade*, 410 U.S. at 152-53. In *Briggs v. North Muskegon Police Department*, 563 F.Supp. 585 (W.D. Mich. 1983), the Court explained:

> A constitutionally guaranteed right to free association has been inferred by the Supreme Court from the First Amendment protection of speech and assembly, *NAACP v. Alabama*, 357 U.S. 449, 460-63, 78 S.Ct. 1163, 1170-72, 2 L.Ed.2d 1488 (1958), and a right of privacy has been found in several provisions of the Constitution, *Griswold v. Connecticut*, 381 U.S. 479, 484-86, 85 S.Ct. 1678, 1681-82, 14 L.Ed.2d 510 (1965). Where these rights come into conflict with interests of state and local governments the legitimate rights of the parties must be reconciled in a manner that is consistent with the Constitution. When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights, *see Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), but it has greater latitude in restricting the activities of its employees than of its citizens in general. *Kelley v. Johnson*, 425 U.S. 238, 245, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708 (1976). Whether the private activities of a public employee can constitute valid grounds for dismissal requires careful consideration of both the interests of the individual and the interests of the government.

Id. at 587. The court in *Briggs* went on to cite *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977), for the proposition that an individual may make,

without unjustified government interference, decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education." Citing *Roberts v. United States Jaycees*, the Eleventh Circuit, in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), indicated that the Supreme Court has recognized that the United States Constitution accords special protection to "intimate association" which relates to an individual's "freedom to choose to enter into and maintain certain intimate human relationships . . . as a fundamental aspect of personal liberty." *Id.* at 1563. "At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives." *Id.*

Sometimes referred to as the First Amendment right to freedom of association, there has been a split of authority as to how these cases are to be analyzed. In *Balton v. City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998), the court remarked:

> We note a split in the circuits on the question. *See Hatcher v. Board of Pub. Educ. and Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) (Connick is not applicable to freedom of association claims); and *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) (Connick analysis applicable to freedom of association cases). In a trio of cases, all, coincidentally, authored by our Judge Ripple, we applied a Pickering/Connick balancing test to association claims. *See Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991); *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993); and *Gregorich v. Lund*, 54 F.3d 410 (7th Cir. 1995). We, therefore, are firmly in the camp of those circuits that employ Connick to associational claims.

Id. at 1040.

In *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), the Eleventh Circuit, in an *en banc* decision, found that the Pickering/Connick balancing test is to be utilized when faced with a government employer's decision to discharge an employee for associational activities. In *Boals v. Grey*, 775 F.2d 686 (6th Cir. 1985), the Sixth Circuit explained:

> In other words, Pickering and Connick, while themselves speech cases, are based upon freedom of association cases. We perceive no logical reason for differentiating between speech and association in applying Connick to First Amendment claims, and hold that it is so applicable.

Id. at 692.[2]

The Pickering/Connick balancing test requires the Court to balance the needs of the government as an employer against the public employee's associational rights. *Connick v. Myers*, 461 U.S. 138 (1983). The MDOC has a strong interest in maintaining impartial employees. The MDOC also must avoid situations which give the appearance of a conflict of interest on the part of its employees. While I would agree with defendants that the MDOC does have a need to restrict non-professional contact between MDOC employees and offenders, the MDOC does not need to accomplish this objective in an inflexible and overly restrictive manner.

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[2] The Sixth Circuit's decision in *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996), did not follow the Pickering/Connick balancing test. The court did not discuss the long line of cases which have applied that test and only referred to the Pickering decision in footnote 7 of the Opinion. In *Montgomery*, a public school antinepotism policy required a teacher to transfer to another school in the district if the teacher became married to another teacher in the building where they both worked. Apparently, because of the minimal impact on the First Amendment associational rights, the court applied a rational basis scrutiny test.

In *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), the Court explained the balancing test:

> The Supreme Court has identified a number of factors for courts to consider when performing the balance: (1) whether the employee's exercising rights "impairs discipline by superiors or harmony among co-workers;" (2) whether the employee's exercising rights "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary;" and (3) whether the employee's exercising rights "impedes the performance of the [employee's] duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899 (citation omitted). The principle underlying the focus on these factors seems to be that the employer's interest will weigh more heavily in the Pickering balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office. *See Kukla*, 647 F.Supp. at 805 ("The public employer-employee cases . . . turn on the extent to which the restriction of the employee's rights relates to the demands of the government agency's work. The scales ultimately tip on whether the restriction is sufficiently related to the agency's work to outweigh the protection given to the right."); Developments in the Law--Public Employment, 97 Harv. L. Rev. 1611, 1748 n. 47 (noting Professor Gerald Frug's assertion that "the linchpin of Court decisions concerning the constitutional rights of public employees is [the] relevance" of challenged restrictions of constitutional rights to preservation of governmental efficiency) (emphasis in original). The more a public employee's transfer or discharge is necessary to the effective functioning of the office, the more the transfer or discharge becomes justifiable, and thus the more likely it is that a court will find the transfer or discharge constitutionally permissible by finding the

> employer's interest to outweigh the employee's interest in the Pickering balance. *See e.g., Morales v. Stierheim*, 848 F.2d 1145, 1151(11thCir. 1988), *cert. denied sub nom. Leon v. Avino*, 489 U.S. 1013, 109 S.Ct. 1124, 103 L.Ed.2d 187 (1989); *McMullen v. Carson*, 754 F.2d 936, 939-40 (11th Cir. 1985); *cf. Rankin*, 483 U.S. at 388-92,107 S.Ct. at 2899-2901. Where loyalty to an employer and the ability to keep confidences are essential to the proper performance of public functions, the public employer's interest will weigh heavily if the employee's exercise of the right would compromise loyalty and confidentiality, because restricting those rights may be necessary to preserve the employer's interest in effective office functioning. *See Pickering*, 391 U.S. at 570, 88 S.Ct. at 1735; *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *see also McDaniel v. Woodard*, 886 F.2d 311, 315 (11th Cir. 1989). For this reason, "[w]hen close working relationships are essential to fulfilling public responsibilities," the Court has accorded "a wide degree of deference to the employer's judgment. *Connick*, 461 U.S. at 151-52, 103 S.Ct. at 1692; *Goffer*, 956 F.2d at 1049.

Id. at 1570-71.

In *Ross v. Clayton County, Georgia*, 173 F.3d 1305 (11th Cir. 1999), the court was confronted with a challenge to the Georgia Department of Corrections' regulation which prohibited "correctional officers from associating, corresponding or doing business with active probationers unless they first receive special permission." *Id.* at 1306. The plaintiff in *Ross* was living with his brother, who was an active probationer. Plaintiff was demoted for his violation of the Georgia Department of Corrections' rule. Plaintiff contended that he was being penalized for living with his brother, in violation of his freedom of association. That rule specifically denied employees the right to personally associate with known

inmates, active probationers or parolees without express written permission from the deputy commissioner. The court explained:

> Pickering requires the district court to balance the interest of the public employee in exercising his right of free speech or association against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734-35; *see also Shahar v. Bowers*, 114 F.3d 1097, 1112 (11th Cir. 1997) (en banc) (Tjoflat, J., specially concurring) ("Pickering balancing, in the public employment context, involves the weighing of the employee's interest in the exercise of a constitutional right against the employer's interest in maintaining an efficient workplace."), *cert. denied*, [522] U.S. [1049], 118 S.Ct. 693, 139 L.Ed. 2d 638 (1998).

Id. at 1310. The court upheld the Georgia Department of Corrections' regulations, explaining, in part:

> In the instant case, the Pickering balance is tilted substantially in favor of Clayton County by the fact that the rule prohibiting association with probationers contains an exception whereby the employee may seek and obtain special permission from the appropriate deputy commissioner. This flexibility enhances the reasonableness of the rule, giving an employee an opportunity to seek an exception in circumstances where the employee's interests are strong and the employer's interests might be accommodated in some manner. It is undisputed that Ross never sought any such waiver or permission. Applying the Pickering balancing test, we hold that there was no violation of Ross's First Amendment rights.

Id. at 1312.

Plaintiffs Akers and Loranger request declaratory rulings that the discipline imposed under the old rule be set aside. For the reasons previously stated in the November 3, 1999, Report and Recommendation, the discipline imposed on plaintiffs Akers and Loranger should be set aside and the prior rule should be declared unconstitutional. The prior Rule 46 is both vague and overbroad. It did not balance the interests of the MDOC with the constitutional rights of its employees. The Rule was inflexible and presented a zero tolerance policy even when there was no threat to security or appearance of impropnety. For all those reasons previously stated, prior Rule 46, in the opinion of the undersigned, is unconstitutional.

Further, plaintiffs argue that the revised Rule 46 should be declared unconstitutional. The revised Rule 46 defines "family member" and creates a procedure for seeking an exception to application of the rule under some circumstances. Special Assistant to the Director Marsha Foresman explains that the revised Rule defines "family member," and permits an employee to request permission to have contact with a family member of an offender or listed visitor of an offender. Linda Wittman attested that records from the correctional Facilities Administration and the Field Operations Administration show that 223 employees requesting exceptions to the rule have been approved, and that only three employees have been denied an exception to the rule. Revised Rule 46 states:

> SEXUAL MISCONDUCT, SEXUAL HARASSMENT, IMPROPER RELATIONSHIPS, OR OVERLY FAMILIAR CONTACT
>
> For purposes of this rule, "Family member" means any of the following: parents, stepparents, spouse, children, stepchildren, siblings or step siblings.

For purposes of this rule, "Listed Visitor" means any person on an offender's approved visitors list as provided in PD 05.03.140 "Prisoner Visiting."

Employees are prohibited from:

Engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.

Engaging in overfamiliarity with an offender, or a family member or listed visitor of an offender.

Employees are further prohibited from retaliating against any person who reports such behavior. Employees shall not disclose to another employee or to an offender that such a report has been filed, the details of the report and/or the status of any investigation, except as required to comply with Department policy or to provide information to their representative in an administrative, civil or criminal proceeding.

An employee shall not make any contact with an offender outside the regular performance of the employee's job except as provided in rule #26, "Improper Entry into a Correctional Facility." Further, an employee shall not make any contact with any family member of an offender, or a listed visitor of an offender, outside the regular performance of the employee's job unless approval has been granted in writing by the Director or applicable Deputy Director or designee. An employee shall use form CAJ-202, "Offender Contact Exception Request" to request such an exception. If an exception is granted, a copy shall be retained in the employee's personnel file.

If an unavoidable contact is made with an offender, a family member of an offender or a listed visitor of an offender, such contact must be reported verbally to the employee's immediate supervisor by the end of the

employee's next regularly scheduled workday. Such reporting is not required if a written exception has been granted as to a family member or listed visitor. The supervisor will determine whether an unavoidable contact warrants a written report, and if so determined, a copy will be sent to the employee's Warden, Regional Prison Administrator or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for, an offender, except if the offender is a family member of the employee, including a spouse where the employee's marriage to the offender existed prior to the employment date. In all cases where the employee lives with or provides lodging to an offender who is family member, this must be immediately reported in writing to the employee's Warden, Regional Prison Administrator, Field Operations Administration Regional Administrator or Central Office Administrator, as applicable.

Unless an exception has been granted pursuant to this rule, examples of behavior which presume overfamiliarity include, but are not limited to:

> Giving or receiving letters, money, personal mementos or telephone numbers to or from an offender or a family member, or a listed visitor of an offender.

Being at the residence of an offender or a family member or listed visitor of an offender.

Non-work related contact or visits with an offender or a family member or listed visitor of an offender without authorization.

Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. An employee who is discharged for violation of this rule or who

> resigns in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department.

This rule, as conceded, could be more narrowly tailored. The rule provides absolutely no exceptions for employee contact outside work with an offender. The rule also fails to provide a time-line for the exception procedure, and fails to state the basis for granting or denying a requested exception. I can envision circumstances where application of the Rule would be a denial of an employee's constitutional rights.

However, no adverse action has been taken against any of the plaintiffs under the newly revised Rule 46. Federal courts have jurisdiction only over actual cases or controversies under Article III of the United States Constitution. *TCG Detroit v. Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000); *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999). The court lacks jurisdiction and must dismiss the case immediately upon termination of the actual case or controversy status. Id. The doctrine exists to ensure that the court decides only existing, substantial controversies, not hypothetical questions or possibilities. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999). In my opinion, no case or controversy currently exists in this case regarding revised Rule 46. Any ruling that the court would make about the constitutionality of revised Rule 46 would have no application to the plaintiffs. Accordingly, the case should be dismissed and judgment entered in favor of the plaintiffs.[3]

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[3] Defendants were able to avoid a judgment against them on damages based upon the doctrine of qualified immunity. Defendants should now know what is required in protecting its employees' constitutional

It is recommended that defendants' motion for summary judgment be denied, plaintiffs' motion for summary judgment be granted in part: plaintiffs Akers' and Loranger's motion requesting that the discipline imposed against them be set aside should be granted, and the prior Rule 46 should be declared unconstitutional. Further, plaintiff Akua Mitchell-Davis' claims should be dismissed as moot and any remaining issues in this case should be dismissed for lack of jurisdiction.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Am*, 474 U.S. 140 (1985).

Dated: October 11, 2000

/s/ Tomothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

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rights and balancing its interests in security. The qualified immunity defense will likely not be available to defendants if any future plaintiff successfully challenges the constitutionality of the current version of Rule 46. In my opinion, the current version of Rule 46 suffers from many of the same constitutional infirmities as the older version.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Nov. 2, 1999]

Case No. 2:97-cv-325

DAWN AKERS, *et al.*,

Plaintiffs,

v.

KENNETH MCGINNIS, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

Hon. Gordon J. Quist

When this action was filed in 1997, plaintiffs Dawn Akers, Kim Loranger and Akua Mitchell-Davis, were employees of the Michigan Department of Corrections (MDOC) who had been discharged for violating a rule entitled "Improper Relationship: Romantic, Sexual, Shared Residence, Unauthorized, or Overly Familiar Contact." This rule prohibited employees of the MDOC from having contact with prisoners, parolees, probationers, or the family members of prisoners, parolees or probationers outside the regular performance of the employee's job. All three plaintiffs challenged their discharge and were reinstated following arbitration proceedings. In this civil action, plaintiffs sought monetary damages and equitable relief. By Opinion and Order of January 14, 1999, this Court dismissed plaintiffs' claims for monetary damages, finding that the defendants were entitled to the defense of qualified immunity. Plaintiffs' claims for equitable relief remain.

In July of this year, plaintiff Loranger gave birth to a child. Plaintiff Loranger intends to have the child baptized and wants Rebecca Contreras, a long-time friend, to act as the godmother for her child. Ms. Contreras has an adult son who is on probation in Macomb County. Plaintiff informed her superiors of her desire to have Ms. Contreras act as the godmother to her child. Plaintiff was informed that should Ms. Contreras act as the godmother, or should plaintiff associate with Ms. Contreras in any manner outside the regular performance of her job duties, plaintiff would be discharged. On September 13, 1999, plaintiff Loranger filed a motion for preliminary injunction, seeking an order of this Court prohibiting the defendants from discharging plaintiff should she associate with Ms. Contreras. The parties have fully briefed the issues.

A hearing was held before the undersigned on October 22, 1999, in Grand Rapids, Michigan. Four witnesses testified during the hearing. Testifying for plaintiff were Kim Loranger and Michael Devine, a UAW Local 6000 employee. Robert Steinman, MDOC Deputy Director, and Marsha Foresman, Special Assistant to the Director of the MDOC, testified for the defendants. In addition, the parties offered into evidence the exhibits attached to their briefs filed in support of their positions with respect to this motion.

The evidence offered through the testimony of witnesses and the documents presented at the hearing fail to identify any disputes as to material facts. It is necessary to outline the relevant facts in order to explain my recommendation. Plaintiff has been employed as a probation officer with the State of Michigan since 1987. She was disciplined in 1996 for sending letters to a prisoner whom she had dated prior to his incarceration. As a probation officer, plaintiff works in the Lincoln Park office in Wayne County. She supervises some 120 individuals who are on probation in Wayne County. If at any time a conflict of interest exists between plaintiff and one of the

individuals she is supervising, that case can be reassigned. Plaintiff has no professional contact with individuals incarcerated within the MDOC or with individuals on parole or on probation in any county other than Wayne. For the past 15 years, plaintiff has known Rebecca Contreras. They are close friends, who have traveled together and socialized together. Ms. Contreras has a son, Eli Jacobs, who, long after the friendship had developed between Ms. Contreras and plaintiff, committed a criminal offense in Macomb County. Mr. Jacobs, an adult, is on probation in Macomb County. Plaintiff has had no professional contact with Mr. Jacobs. In fact, the record does not indicate that there has been any significant contact between plaintiff and Mr. Jacobs. The record does not provide any insight into the nature of the relationship between Ms. Contreras and Mr. Jacobs.

Plaintiff gave birth to a son on July 19, 1999. Plaintiff had wanted Ms. Contreras to act as her Lamaze coach and to attend plaintiff's baby shower. According to plaintiff, defendants indicated that if Ms. Contreras acted as plaintiffs Lamaze coach or attended plaintiff's baby shower, plaintiff would be discharged. Plaintiff wants to involve Ms. Contreras in the raising of her child and wants Ms. Contreras to act as the godmother and attend the baptism of her child. Defendants have indicated that should plaintiff maintain a personal relationship with Ms. Contreras, she will be discharged. Under what is termed the "zero tolerance" policy, any contact with a family member of a prisoner, parolee or probationer anywhere within the State of Michigan will result in discharge of an MDOC employee. Plaintiff did not file a grievance to challenge the decision of the defendants to discharge her if she had Ms. Contreras act as the godmother of her child because she was informed it would be futile. In fact, prior to the hearing on plaintiff's motion for preliminary injunction, I held a telephone conference with the attorneys in which I asked that they contact their respective clients and discuss whether or not there was any potential resolution to the issues

raised in this motion. I was informed that the defendants would not consider modifying their policy and that under the "zero tolerance" policy, plaintiff would be discharged if she has Ms. Contreras act as the godmother of her child. Plaintiff has been told she can transfer to another position outside the MDOC, or that she can quit her job if she seeks to have Ms. Contreras act as her child's godmother.

The rule at issue in this matter has undergone several changes. In April of 1996, when plaintiff was disciplined for writing letters to a prisoner, the rule was known as Rule 12. Under this rule, the employer had the ability to review situations on a case by case basis and employees were disciplined based on the nature of the contact they had with a prisoner, parolee, probationer, or the family members of a prisoner, parolee or probationer. Rule 12 was eventually replaced by Rule 24, and then replaced with Rule 46, the rule which is presently in effect. Rule 46 provides:

> 46. SEXUAL MISCONDUCT, SEXUAL HARASSMENT OR OVERFAMILIARITY
>
> *Definitions for use with this rule:*
>
> "Sexual Misconduct": engaging in or attempting to engage in a sexual act or the intentional touching of genitals, anus, groin, breast, inner thigh or buttocks with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person. This also includes indecent exposure.
>
> "Sexual Harassment": engaging in sexual advances, requests for sexual favors, and other offensive verbal or physical conduct of a sexual nature. This includes verbal conduct of a gender-related nature intended to humiliate, harass, degrade or arouse.
>
> "Overfamiliarity": conduct which has or is likely to result in intimacy, a close personal or non-work related association.

"Facility": any property owned or leased by the Michigan Department of Corrections.

Work Rule Content:

Employees are prohibited from:

—engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.

—engaging in overfamiliarity with an offender, their family member(s) or their visitors.

Employees are further prohibited from retaliating against any person who reports such behavior. Except as required to comply with Department policy, employees shall not disclose to another person, including an employee or an offender, that such a report has been filed, the details of the report and/or the status of any investigation.

An employee shall not make any contact with an offender or their family member(s) or their visitor(s) outside the regular performance of the employee's job. If any unavoidable contact is made, such contact must be reported verbally to the employee's immediate supervisor by the end of the employee's next regularly scheduled workday. The supervisor will determine whether the contact warrants a written report, and if so determined, a copy will be sent to the employee's warden, Field Operations Administration Regional Administrator, or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for, an offender, except for an employee's parents, stepparents, children, step-children, siblings, or step-siblings or spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where lodging is provided, this must be immediately reported to the employee's Warden, Field

Office Administration Regional Administrator or Central Office Administrator, as applicable.

Examples of overfamiliarity which are prohibited by this rule include, but are not limited to:

—Giving or receiving letters, money, telephone numbers or anything else that is not authorized by policy to or from an offender, their family member(s), or a visitor.

—Being at the home of an offender, their family member(s), or their visitor(s) for reasons other than official Department business.

—Non-work related contact or visits with an offender, their family member(s) or their visitor(s) without authorization.

Any violations of this rule will be grounds for dismissal. Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. Department staff who are discharged for violation of this rule or who resign in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department of Corrections.

Rule 46, unfortunately, does not define "family members." Marsha Foresman, who testified at the hearing, indicated that family members is defined as parents, step-parents, children, step-children, siblings, step-siblings or spouse. Thus, under Rule 46, an employee of the MDOC is prohibited from having non-professional contact with the parents, step-parents, children, step-children, siblings, step-siblings or the spouse of any prisoner, parolee or probationer within the State of Michigan. No evidence was offered as to the total number of people within the State of Michigan with whom MDOC employees are barred from having non-professional

contact. The number is, at a minimum, in the hundreds of thousands.

Michael Devine, a UAW Local 6000 employee, testified at the hearing. He is a Union representative who has been assisting plaintiff in this matter. Mr. Devine's brother was arrested for operating a motor vehicle under the influence of liquor and is presently on probation. It was established that after the hearing in this matter, plaintiff could be discharged if she had lunch with the Union representative because his brother is on probation somewhere within the MDOC. Various examples were given as to the impact of Rule 46 on employees of the MDOC. For instance, MDOC employees could not attend any alcoholics anonymous meetings if any attendees at those meetings were on parole or probation from anywhere within the State of Michigan. MDOC employees are prohibited from attending any church social function where family members of a prisoner, parolee or probationer might be in attendance. According to Robert Steinman, MDOC Deputy Director, there are no exceptions to this zero tolerance policy.[1] The testimony of Mr. Steinman and Ms. Foresman establishes that this zero tolerance policy was adopted as a result of the MDOC losing several arbitration awards and receiving unfavorable court rulings in the case of *United States v. Michigan*, 680 F. Supp. 270 (W.D. Mich. 1988). The MDOC lost several arbitration cases when employees challenged their discharge pursuant to either Rule 12 or Rule 24. At least one of the reasons for the unfavorable results received by MDOC at these arbitrations was the perceived inconsistency of the discipline meted out by the MDOC for violations of Rule 12 or Rule 24. Obviously unhappy with its losses in arbitration, the MDOC threw

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[1] Ms. Foresman offered testimony suggesting that the Director of the MDOC had the authority to waive application of Rule 46. This testimony is somewhat inconsistent with the assertions by the witnesses and by counsel for defendants that there was a "zero tolerance" policy.

caution to the wind and adopted the zero tolerance policy which requires the discharge of an employee who has non-professional contact with a family member of a prisoner, parolee or probationer, regardless of whether or not that contact presents any legitimate concerns for the MDOC.

Both Mr. Steinman and Ms. Foresman offered testimony which establishes that the MDOC has a very legitimate interest in protecting the integrity of its office and ensuring the security of its employees. Contact between employees of the MDOC and prisoners, parolees or probationers can lead to various problems. The testimony establishes that an MDOC employee can be compromised by developing a personal relationship with offenders. This can result in an increased risk of drug smuggling or extortion, or the employee being harassed or harmed. Examples were given of serious problems which have arisen when probation officers dated MDOC offenders and the need to have a rule which prevents such problems from occurring in the future. Moreover, the MDOC has a legitimate interest in avoiding the appearance of conflicts of interests on the part of MDOC employees.

Presently before the Court is plaintiff Loranger's request for injunctive relief. Specifically, plaintiff seeks an order of this Court permitting her to have Ms. Contreras act as the godmother of her child and participate in the raising of that child.

There is no evidence before the Court that supports a finding that if plaintiff has Ms. Contreras act as the godmother of her child a security risk will exist. Moreover, the defendants have not maintained that this situation could present the appearance of a conflict of interest. Plaintiff does not supervise any individuals from Macomb County and has no access to information regarding Mr. Jacobs. There is no suggestion that plaintiff is in a position to affect Mr. Jacobs' status or that her relationship with Ms. Contreras somehow raises the appearance of a potential conflict of interest. In fact, defen-

dants' position is that they no longer wish to examine situations on a case by case basis to determine whether or not an employee of the MDOC should be restricted in their personal contact with an individual.

The issuance of preliminary injunctive relief is committed to the discretion of the district court. *Planned Parenthood Association v. City of Cincinnati*, 822 F.2d 1390, 1393 (6th Cir. 1987). In exercising that discretion, the court must consider and balance four factors:

1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.

2. Whether the movant has shown irreparable injury.

3. Whether the preliminary injunction could harm third parties.

4. Whether the public interest would be served by issuing a preliminary injunction.

Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994).

These factors are not prerequisites to the grant or denial of injunctive relief, but factors that must be carefully balanced by the district court in exercising its equitable powers. *Id.*

Moreover, where a plaintiff seeks an order enjoining state prison officials, this Court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. *See Kendrick v. Bland*, 740 F.2d 432 at 438, n.3 (6th Cir.1984). *See also Harris v. Wiltesrs*, 596 F.2d 678 (5th Cir.1979). It has also been remarked that a party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *See Checkers Motors Corp.*, 405 F.2d 319 (2d Cit. 1969), *cert. denied*, 394 U.S. 999 (1969). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

Plaintiffs "initial burden" in demonstrating entitlement to preliminary injunctive relief is a showing of a strong or

substantial likelihood of success on the merits of her Section 1983 action. *NAACP, v. City of Mansfield, Ohio*, 866 F.2d 162, 167 (6th Cir. 1989).

I will first turn to an analysis of the law that applies to this situation and plaintiff's ability to show a strong or substantial likelihood of success on the merits. The United States Supreme Court explained in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

> [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educa tional, religious, and cultural ends. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933, 102 S.Ct. 3409, 3422-3423, 3436, 73 L.Ed.2d 1215 (1982); *Larson v. Valente*, 456 U.S. 228, 244-246, 102 S.Ct. 1673, 1683, 1684, 72 L.Ed.2d 33 (1982); *In re Primus*, 436 U.S. 412, 426, 98 S.Ct. 1893, 1901, 56 L.Ed.2d 261 (1977).

Id. at 622. The Supreme Court has recognized a "zone of privacy" which has gained constitutional protection. The Supreme Court has indicated that only "fundamental" rights are within this zone. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). The Court has not fully explained the extent and nature of the interests protected under the "zone of privacy." The types of rights protected by this "zone of privacy" have related primarily to personal decisions concerning "marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." *Roe v. Wade*, 410 U.S. at 152-53. In *Briggs v. North Muskegon Police Department*, 563 F.Supp. 585 (W.D. Mich. 1983), the Court explained:

> A constitutionally guaranteed right to free association has been inferred by the Supreme Court from the First Amendment protection of speech and assembly, *NAACP*

> *v. Alabama*, 357 U.S. 449, 460-63, 78 S.Ct. 1163, 1170-72, 2 L.Ed.2d 1488 (1958), and a right of privacy has been found in several provisions of the Constitution, *Griswold v. Connecticut*, 381 U.S. 479, 484-86, 85 S.Ct.1678, 1681-82, 14 L.Ed.2d 510 (1965). Where these rights come into conflict with interests of state and local governments the legitimate rights of the parties must be reconciled in a manner that is consistent with the Constitution. When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights, *see Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), but it has greater latitude in restricting the activities of its employees than of its citizens in general. *Kelley v. Johnson*, 425 U.S. 238, 245, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708 (1976). Whether the private activities of a public employee can constitute valid grounds for dismissal requires careful consideration of both the interests of the individual and the interests of the government.

Id. at 587. The court in *Briggs* went on to cite *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977), for the proposition that an individual may make, without unjustified government interference, decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education." Citing *Roberts v. United States Jaycees*, the Eleventh Circuit, in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), indicated that the Supreme Court has recognized that the United States Constitution accords special protection to "intimate association" which relates to an individual's "freedom to choose to enter into and maintain certain intimate human relationships . . . as a fundamental aspect of personal liberty." *Id.* at 1563. "At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives." *Id.*

Sometimes referred to as the First Amendment right to freedom of association, there has been a split of authority as to how these cases are to be analyzed. In *Balton v. City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998), the court remarked:

> We note a split in the circuits on the question. *See Hatcher v. Board of Pub. Educ. and Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) (Connick is not applicable to freedom of association claims); and *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) (Connick analysis applicable to freedom of association cases). In a trio of cases, all, coincidentally, authored by our Judge Ripple, we applied a Pickering/Connick balancing test to association claims. *See Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991); *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993); and *Gregorich v. Lund*, 54 F.3d 410 (7th Cir. 1995). We, therefore, are firmly in the camp of those circuits that employ Connick to associational claims.

Id. at 1040.

In *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), the Eleventh Circuit, in an en banc decision, found that the Pickering/Connick balancing test is to be utilized when faced with a government employer's decision to discharge an employee for associational activities. In *Boals v. Grey*, 775 F.2d 686 (6th Cir. 1985), the Sixth Circuit explained:

> In other words, Pickering and Connick, while themselves speech cases, are based upon freedom of association cases. We perceive no logical reason for differentiating between speech and association in applying Connick to First Amendment claims, and hold that it is so applicable.

Id. at 692.[2]

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[2] The Sixth Circuit's decision in *Montgomery v. Carr*, 101 F.3d 1117 (6th Or. 1996), did not follow the Pickering/Connick balancing test. The

The Pickering/Connick balancing test requires the Court to balance the needs of the government as an employer against the public employee's associational rights. The MDOC has a strong interest in maintaining impartial probation officers. The MDOC also must avoid situations which give the appearance of a conflict of interest on the part of probation officers. The affidavits of Foresman, Steinman and Bolden establish the need for the MDOC to restrict nonprofessional contact between MDOC employees and offenders. Those affidavits do not establish that it is necessary to do so in an inflexible and overly restrictive manner.

In *Kirchgessner v. Wilentz*, 884 F.Supp. 901 (D. NJ. 1995), the district court upheld a prohibition on probation officers from membership in law enforcement organizations. The court recognized that there was a clear conflict of interest between probation officers who worked for the court and law enforcement officers. The court pointed out that probation officers are part of the judiciary and that there was an appearance of partiality if probation officers were permitted to join the ranks of law enforcement agents. Thus, the court upheld a ban of probation officers being members in a law enforcement officers' organization.

In *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir.1994), the Court explained:

> The Supreme Court has identified a number of factors for courts to consider when performing the balance: (I) whether the employee's exercising rights "impairs

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court did not discuss the long line of cases which have applied that test and only referred to the Pickering decision in footnote 7 of the Opinion. In *Montgomery*, a public school antinepotism policy required a teacher to transfer to another school in the district if the teacher became married to another teacher in the building where they both worked. Apparently, because of the minimal impact on the First Amendment associational rights, the court applied a rational basis scrutiny test. The impact of Rule 46 on the plaintiff in this case does not provide a minimal impact on her associational rights.

discipline by superiors or harmony among co-workers;" (2) whether the employee's exercising rights "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary;" and (3) whether the employee's exercising rights "impedes the performance of the [employee's] duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899 (citation omitted). The principle underlying the focus on these factors seems to be that the employer's interest will weigh more heavily in the Pickering balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office. *See Kukla*, 647 F.Supp. at 805 ("The public employer-employee cues . . . turn on the extent to which the restriction of the employee's rights relates to the demands of the government agency's work. The scales ultimately tip on whether the restriction is sufficiently related to the agency's work to outweigh the protection given to the right."); Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1748 n. 47 (noting Professor Gerald Frug's assertion that "the linchpin of Court decisions concerning the constitutional rights of public employees is [the] relevance" of challenged restrictions of constitutional rights to preservation of governmental efficiency) (emphasis in original). The more a public employee's transfer or discharge is necessary to the effective functioning of the office, the more the transfer or discharge becomes justifiable, and thus the more likely it is that a court will find the transfer or discharge constitutionally permissible by finding the employer's interest to outweigh the employee's interest in the Pickering balance. *See e.g. Morales v. Stierhiem*, 848 F.2d 1145, 1151 (11th Cir. 1988), *cert. denied sub nom. Leon v. Avino*, 489 U.S. 1013, 109 S.Ct. 1124, 103 L.Ed.2d 187 (1989); *McMullen v. Carson*, 754 F.2d 936, 939-40 (11th Cir. 1985); *cf. Rankin*, 483 U.S. at 388-92, 107 S.Ct. at 2899-2901. Where loyalty to an employer and the ability to keep confidences are essential to the

> proper performance of public functions, the public employer's interest will weigh heavily if the employee's exercise of the right would compromise loyalty and confidentiality, because restricting those rights may be necessary to preserve the employer's interest in effective office functioning. *See Pickering*, 391 U.S. at 570, 88 S.Ct. at 1735; *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *see also McDaniel v. Woodard*, 886 F.2d 311, 315 (11th Cir. 1989). For this reason, "[w]hen close working relationships are essential to fulfilling public responsibilities," the Court has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 U.S. at 151-52,103 S.Ct. at 1692; *Goffer*, 956 F.2d at 1049.

Id. at 1570-71.

In *Ross v. Clayton County, Georgia*, 173 F.3d 1305 (11th Cir. 1999), the court was confronted with a challenge to the Georgia Department of Corrections' regulation which prohibited "correctional officers from associating, corresponding or doing business with active probationers unless they first receive special permission." *Id.* at 1306. The plaintiff in *Ross* was living with his brother, who was an active probationer. Plaintiff was demoted for his violation of the Georgia Department of Corrections' rule. Plaintiff contended that he was being penalized for living with his brother, in violation of his freedom of association. That rule specifically denied employees the right to personally associate with known inmates, active probationers or parolees without express written permission from the deputy commissioner. The court explained:

> Pickering requires the district court to balance the interest of the public employee in exercising his right of free speech or association against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734-35; *see also Shahar v. Bowers*, 114

> F.3d 1097, 1112 (11th Cir. 1997) (en banc) (Tjoflat, J., specially concurring) (Pickering balancing, in the public employment context, involves the weighing of the employee's interest in the exercise of a constitutional right against the employer's interest in maintaining an efficient workplace."), cert. denied, __ U.S. __, 118 S.Ct. 693, 139 L.Ed. 2d 638 (1998).

Id. at 1310. The court upheld the Georgia Department of Corrections' regulations, explaining, in part:

> In the instant case, the Pickering balance is tilted substantially in favor of Clayton County by the fact that the rule prohibiting association with probationers contains an exception whereby the employee may seek and obtain special permission from the appropriate deputy commissioner. This flexibility enhances the reasonableness of the rule, giving an employee an opportunity to seek an exception in circumstances where the employee's interests are strong and the employer's interests might be accommodated in some manner. It is undisputed that Ross never sought any such waiver or permission. Applying the Pickering balancing test, we hold that there was no violation of Ross's First Amendment rights.

Id. at 1312.

Rule 46 of the Michigan Department of Corrections is far more sweeping in its impact upon the associational rights of MDOC employees. Furthermore, the zero tolerance policy provides no flexibility. The rule as it is presently being interpreted does not balance the interests of the MDOC as employer against the constitutional rights of the employee. Where there is no threat of security, no appearance of conflict, and no suggestion of improper contact, discharge is mandated. Initially, it must be remarked that the rule is vague in that it does not define "family member," Accepting Ms. Foresman's definition of family member, MDOC employees may not have contact with hundreds of thousands of individu-

als over whom they have no professional working relationship. Rule 46 is both vague and overbroad. It does not attempt to regulate those relationships which could result in a conflict of interest or could provide an appearance of a conflict of interest. It is not narrowly focused to the needs of the MDOC. As the court remarked in *Kukla v. Village of Antioch*, 647 F.Supp. 799 (ND. Ill.1986), in affirming a regulation which prohibited marriage between police officers in the same department:

> Defendants did not attempt to regulate all the relationships of their employees, but rather only their relationships with other department employees of different rank. The narrow focus of the regulation sets it apart from two more of the cases on which the Kuklas rely. In neither *Briggs* nor *Schuman* was the object of the officer's affections another employee of the department. Impact on the farce obviously is more likely when both halves of the relationship are members of it. *See Shawgo*, 701 F.2d at 483.

Id. at 810.

There is no evidence that allowing the Loranger/Contreras friendship to continue would somehow impede the work performance of plaintiff or would interfere with the regular operation of the MDOC. Further, there is no suggestion that if Ms. Contreras is the godmother of plaintiffs child, there will somehow be a detrimental impact on the working relationship of plaintiff and her employers.

The justification for the defendants' zero tolerance rule appears to be a result of the MDOC's frustration with the U.S. Courts as a result of decisions in *United States v. Michigan*. Unfortunately, the testimony of Ms. Foresman, while indicating that the zero tolerance rule was in part a reaction to the MDOC's dealings with the United States Department of Justice, provided no explanation as to what the relationship was between that case and Rule 46. Also, defen-

dants appear to be disturbed that they were unsuccessful in several labor arbitrations. Defendants have not attempted to develop a rule that could be consistently applied and would take into consideration the constitutional rights of its employees. Rather, defendants appear to have thrown up their hands and concluded that everyone who has non-professional contact with a relative of an offender within the MDOC should be discharged, even those who have engaged in the most innocent of contact.

In my opinion, Rule 46, as it is presently being applied, far exceeds that which is necessary to protect the legitimate interests of the defendants. Therefore, I recommend that the Court find that plaintiff has shown a probability of success on the merits.

I next turn to whether plaintiff has shown irreparable injury. Plaintiff's choice in this matter is to quit her job, give up her profession as a probation officer in the State of Michigan, or abandon her friendship with Ms. Contreras. In giving up her friendship with Ms. Contreras, plaintiff will also be required to find another godmother for her child and she will not have Ms. Contreras' assistance in the raising and educating of her child.

Unlike the plaintiffs in *Montgomery v. Carr*, where the plaintiffs were not permitted to teach in the same school and the rule required transfer to another school within the district, plaintiff cannot transfer to a probation officer position anywhere in the State of Michigan. Moreover, plaintiff would not be able to perform the duties of a parole officer anywhere in the State of Michigan, and she would be prohibited from working for the MDOC altogether. Plaintiff would thus be required to give up a career which she has pursued since 1987. In the alternative, plaintiff must give up a long time friend, and the proposed godmother to her child. In my opinion, plaintiff has shown that she will suffer irreparable injury absent relief from this Court. Allowing plaintiff to

continue in her position and maintain her friendship with Ms. Contreras merely preserves the status quo. Should the defendants ultimately prevail in this matter, the issuance of a preliminary injunction will not have caused defendants to suffer any adverse consequences.

The next factor to consider is whether the preliminary injunction could harm third parties. There has been no suggestion that it would harm any third parties. There is no suggestion that allowing Ms. Contreras to be the godmother of plaintiffs child will create a conflict of interest or that it presents a security risk to the MDOC. Removing plaintiff from her position may present harm to third parties in that the 120 people plaintiff is now supervising will have to be assigned to a new probation officer. Furthermore, the state will be losing the services of a competent probation officer.

The next factor to consider is whether the public interest would be served by issuing a preliminary injunction. The record before the Court indicates that plaintiff has performed her duties as a probation officer in a satisfactory manner. It is in the best interests of the public to have competent probation officers working for the MDOC. As indicated above, there is no suggestion of an actual conflict of interest or that the issuance of a preliminary injunction will somehow place at risk any member of the public or employee of the MDOC. Because plaintiff is presently supervising 120 probationers, the public interest would be served by maintaining the status quo pending ultimate resolution of the issues presented in this case.

With respect to the two factors just discussed, the defendants have not maintained that a preliminary injunction would harm third parties or that it is somehow not in the best interests of the public. Accordingly, based on the four factors this Court must consider and balance, issuance of the injunctive relief requested by plaintiff would appear appropriate.

Defendants raise two arguments which they believe support their position that plaintiff should be denied the requested injunctive relief. First, defendants maintain that the earlier arbitration acts as a bar to this action. This argument fails for several reasons. The first arbitration in 1996 dealt with Rule 12. The 1997 arbitration, upon which the defendants rely, dealt with Rule 24. This case deals with Rule 46. More importantly, the arbitration was a challenge to the conduct of the defendants in the context of a collective bargaining agreement. There is no suggestion that the collective bargaining agreement required members of the collective bargaining unit to waive their constitutional rights, or that they were barred from pursuing a 42 U.S.C. § 1983 action under the collective bargaining agreement.

In a related argument, the defendants maintain that the collective bargaining agreement would be violated by an injunction. Initially, it must be remarked that the defendants' position is that it has complete discretion with respect to the discharge of individuals under the circumstances presented. Moreover, it appears that adoption of the zero tolerance policy was a unilateral action by the defendants and not a matter negotiated in the collective bargaining agreement. Moreover, as stated above, the issue presented in this case is one of constitutional rights, not of interpretation of a collective bargaining agreement *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, fn. 8 (6th Cir. 1999); *Bromley v. Michigan Education Association-NEA*, 82 F.3d 686 (6th Cir. 1996). *See also Smith v. Kaldor*, 869 F.2d 999 (6th Cir. 1989). To the extent defendants suggested that plaintiff should be required to exhaust her union remedies, it is clear that that would be futile. in fact, defense counsel admitted during the hearing that under the zero tolerance rule, there would be no point in pursuing this matter through the grievance machinery and that he had discussed this with the defendants and they would not grant plaintiff an exception in this case. Most importantly, defendants' argument that the

arbitration and collective bargaining agreements somehow act as a bar to plaintiff's request for a preliminary injunction ignores U.S. Supreme Court precedent. *See McDonald v. City of West Branch*, 466 U.S. 284 (1984).

Accordingly, it is respectfully recommended that plaintiff Loranger's motion for injunctive relief (Docket #53) be granted and that an order be issued permitting plaintiff to go forward with her plans to have her child baptized and have Rebecca Contreras act as the godmother of the child.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir.1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
United States Magistrate Judge

Dated: November 2, 1999

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Nov. 24, 1999]

Case No. 2:97-CV-325

DAWN AKERS,

Plaintiff,

v.

PATRICIA CARUSO, et al.,

Defendants.

ORDER
APPROVING REPORT AND RECOMMENDATION

Hon. Gordon J. Quist

The court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action. The Report and Recommendation was duly served on the parties on November 3, 1999. No objections have been filed pursuant to 28 U.S.C. § 636(b)(1)(C).

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge, filed November 3, 1999, is approved and adopted as the opinion of the court.

/s/ Gordon J. Quist
GORDON J. QUIST
United States District Judge

Dated: Nov. 24, 1999

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 2:97-cv-325

DAWN AKERS, *et al*,
Plaintiffs,

v.

KENNETH MCGINNIS, *et al*.,
Defendants.

HON. GORDON J. QUIST

REPORT AND RECOMMENDATION

Plaintiffs Dawn Akers, Kim Loranger and Akua Mitchell-Davis are employees of the Michigan Department of Corrections (MDOC) who were dismissed for violating the rule entitled "Improper Relationship: Romantic, Sexual, Shared Residence, Unauthorized, or Overly Familiar Contact." The rule provides that "[a]n employee shall not make any contact with a prisoner, parolee, probationer, family member(s) or visitors outside the regular performance of the employee's job." All three plaintiffs successfully grieved their discharge, and have been reinstated as MDOC employees. Defendants are MDOC Director Kenneth McGinnis, Deputy Director Robert Steinman, Administrative Assistant Marsha Foresman, Chippewa Correctional Facility Warden Patricia (URF) Caruso, URF Inspector John Marshall, URF Personnel Officer Edward Haggerty, URF Business Manager George Marra, MDOC Regional Administrator William Overton,

MDOC Deputy Regional Administrator Ruth Dare, MDOC Area Manager Frank Eisenhauer, MDOC Area Manager Joseph Jereckos, Director of MDOC Handlon Michigan Training Unit John Makowski, Muskegon Correctional Facility Warden Terry Pitcher, MDOC Parole Supervisor Kirk McVittie, MDOC Parole Supervisor Gwen Rodgers and MDOC Probation Supervisor Richard Bazzy.

Plaintiff Dawn Akers, a bookkeeper with almost ten years of MDOC service, was investigated and discharged when, during her non-working hours, she gave a parolee rides to the hospital, to potential job locations, and to his parents' house. Plaintiff was reinstated by an arbitrator and given a 30-day suspension. Plaintiff was not reinstated to her previous position and has been denied security clearance.

Plaintiff Kim Loranger, a probation officer with more than eight years employment with the MDOC, was investigated and discharged after he exchanged letters with prisoner incarcerated at another MDOC facility. Plaintiff had dated the prisoner prior to his incarceration. Plaintiff was reinstated by an arbitrator and received a five-day suspension. After her reinstatement, plaintiff was prohibited from having contact with her best friend after her friend's son was placed on probation in a jurisdiction other than the one where plaintiff worked.

Plaintiff Akua Mitchell-Davis was employed one and one half years prior to defendants' investigation and plaintiffs subsequent discharge. Plaintiff was discharged after she gave an acquaintance, whose son was detained in a county facility, rides to see the son, and, on one occasion, relayed a message to the son while he was confined in the facility. Plaintiff has been reinstated by the arbitrator with seniority but without back pay or benefits.

Plaintiffs allege that the defendants violated their rights to free association, privacy and due process of law as guaranteed

by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. Each plaintiff requests compensatory damages in the amount of $500,000, attorneys fees and punitive damages. Plaintiffs also seek equitable relief. Plaintiffs request immediate reinstatement to their former positions, expungement of the investigations and disciplinary actions from their personnel files, and an injunction against the enforcement of the rule which was enforced against them.

Defendants move to dismiss under Fed. R., Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the pleading, requiring the court to determine whether the plaintiff would be entitled to relief if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle [the plaintiff] to relief." *Conley v. Gibson*, 355 U.S. 41, 4546 (1957). The court must construe the complaint in the light most favorable to plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A judge may not dismiss the complaint simply because he disbelieves the complaint's factual allegations. *Conley, supra*, at 47.

Generally, a complaint need only give "fair notice of what the plaintiffs claim is and the grounds upon which it rests." *In re DeLorean Motor Co. v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993) (*quoting Conley, supra*, at 47). The fundamental purpose of pleadings under the Federal Rules of Civil Procedure is to give adequate notice to the parties of each side's claims and to allow cases to be decided on the merits after an adequate development of the facts. *Mayer, supra*, at 638. While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *Delorean, supra*, at 1240. "In practice, a complaint must contain either direct or inferential allegations respecting all

the material elements to sustain a recovery under some viable legal theory." *Id.* (internal quote omitted).

Government officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997); *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir. 1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 8i 8 (1982). An "objective reasonableness" test is used to determine whether the official could reasonably have believed his conduct was lawful. *Anderson Creighton*, 483 U.S. 635, 641 (1987). That is, in light of pre-existing law, the unlawfulness of the official's conduct must be apparent. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

Defendants argue that they are entitled to qualified immunity. The operation of the qualified immunity standard depends substantially upon the level of generality at which the relevant legal rule is to be identified.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of the preexisting law the unlawfulness must be apparent.

Anderson, supra, at 639-40. *See also Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir.1996), *cert. denied*, 117 S. Ct. 1337 (1997).

The Sixth Circuit has observed:

> A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest

> court of the state in which the' alleged constitutional violation occurred.

Durham, 97 F.3d at 866 (citing *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)).

Thus, qualified immunity is not triggered only where the very action in question was previously held unlawful. *Anderson, supra*, at 639-40. Rather, the test is whether the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violated plaintiffs federal rights. *Id.*

Furthermore, a defendant need not actively participate in unlawful .conduct in order to be liable under Section 1983. Rather, a defendant may be liable where he has a duty to protect a plaintiff and fails to comply with this duty. *Durham*, 97 F.3d at 866-868 (holding that a nurse and a security guard at a state hospital may be liable under Section 1983 where they do not take action to prevent a patient from being beaten). *See also McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990) (a correctional officer who observes an unlawful beating may be liable under Section 1983 even though he did not actively participate in the beating), and *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. denied sub nom, Bates v. Bruner*, 459 U.S. 1171 (1983) (police officers who stood by and observed an unlawful beating by fellow officers could be held liable under Section 1983).

When faced with a qualified immunity defense, the court must first determine whether or not the plaintiff has stated a claim upon which relief can be granted. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Turner*, 119 F.3d at 429. If the court answers that question in the affirmative, the court goes on to determine whether or not the right allegedly violated was clearly established. *Turner, supra*. These are both purely legal questions. The immunity issue should not be resolved if there are factual disputes on which the issue of immunity turns

such that it cannot be determined before trial whether the defendants' conduct violated clearly established rights. *Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991). Thus, where the underlying claim is one in which a certain motive or intent is an element, and plaintiff has made allegations which, if proven, will establish the existence of the necessary state-of-mind, a factual issue exists, preventing dismissal pursuant to Rules 12(b)(6) or 56. *See Sanchez v. Sanchez*, 777 F. Supp. 906 (D.N.M.1991). In the Sixth Circuit, plaintiff need not include such allegations in his complaint, since in preparing his complaint, he has no duty to anticipate affirmative defenses. *Dominique v. Telb*, 831 F.2d 673, 676 (1987). However, once the affirmative defense is raised, plaintiff must come forward with such additional facts as would establish the requisite state of mind). *Id.*

> Accordingly, when a plaintiff pleads his claim in generalized "notice" form, and the defense of qualified immunity is asserted through a motion to dismiss, the plaintiff is required to respond to that defense. If his original complaint is deficient in that regard, he must amend his complaint to include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity. For example, if the original complaint alleged that a police officer "used excessive force," and qualified immunity is asserted, then plaintiff would be required to amend with allegations of evidence sufficient to demonstrate that the force used against him was, indeed, unreasonable. It is in this sense that a heightened standard attaches to plaintiffs pleading.

Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995).

In the opinion of the undersigned, when the issue is raised prior to the completion of discovery, the plaintiff must simply respond with specific allegations of fact adequate to survive scrutiny under Rule 12(b)(6) standards. However, when the

issue of motive is raised in the context of a motion for summary judgment following an adequate period of discovery, the amount of proof required is that quantum of evidence necessary to allow a jury to return a verdict in plaintiffs favor. *Crutcher v. Commonwealth of Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989); *Hull v. Cuyahoga Valley Joint Vocational School District Bd. of Education*, 926 F.2d 505 (6th Cir.), *cert., denied sub nom., Hull v. Shuck*, 501 U.S. 1261 (1991). *Cf. Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (to avert dismissal short of trial, plaintiff must come forward with something more than inferential or circumstantial support for his. allegation of unconstitutional motive). A plaintiff will defeat a defense of qualified immunity if he can present sufficient evidence to prove the existence of a genuine issue of material fact regarding the issue of immunity or if the undisputed facts show that defendant violated plaintiff's clearly established rights. *Noble*.

When ruling on qualified immunity, this court must expressly identify the right at issue and summarize the factual or evidentiary basis for its conclusion. *Noble; Wegener, supra*, at 392. In determining whether a clearly established right exists, the district court looks first to the binding precedent of the Supreme Court, then to that of the Sixth Circuit, and then finally to decisions of other jurisdictions. *Wegener, supra*, at 392; *Masters v. Crouch*, 872 F.2d 1248, 1251-52 (6th Cir.), *cert. denied sub nom, Frey v. Masters*, 493 U.S. 977 (1989); *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989); *Ohio Civil Service Employees Assn. v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). Public officials are expected to be aware of clearly established law specifically governing their conduct. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.), *cert. denied sub nom, Jones v. Long*, 502 U.S. 863 (1991).

While defendants bear the initial burden of presenting facts that, if true, would entitle them to immunity, the ultimate burden of proof falls on the plaintiff to show that the defendants violated a right so clearly established that any official in defendants' positions would have clearly understood that he was under an affirmative duty to refrain from such conduct. *Noble; Wegener, supra*, at 392.

Defendants argue that plaintiffs cannot present any clearly established law which could support plaintiffs claims. Plaintiffs argue that defendants have violated clearly established law by infringing various constitutional rights. Plaintiffs rely on *Briggs v. North Muskegon Police Department*, 563 F. Supp. 585 (W.D. Mich. `1983), aff'd 746-F 2d-14751(6th-Cir.-1984). In Briggs, plaintiff, a police officer, was investigated and discharged from the department after he was discovered living with a woman who was not his wife. Plaintiff and his wife were separated. The court stated:

> When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights, see *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), but it has a. greater latitude in restricting the activities of its employees that of its citizens in general. *Kelley v. Johnson*, 425 U.S. 238, 245, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708 (1976). Whether the private activities of a public employee can constitute valid grounds for dismissal requires careful consideration of both the interests of the individual and the interests of the government.

Id. at 587. The court determined that plaintiffs privacy interest in living with a woman who was not his wife was "sufficiently fundamental to warrant scrutiny of defendants' acts on more than a minimal rationality basis." *Id.* at 590. Community disapproval and defendants' interest in the personal sexual activities and living arrangements of its officers, failed to outweigh plaintiff s privacy interests especially

where the defendants failed to show an adverse impact on plaintiffs job performance. Nor could defendants show that plaintiff violated any law. Accordingly, the court concluded that plaintiffs discharge violated his constitutional rights.

Plaintiffs also point to *Jackson v. Howell*, 577 F. Supp 47 (W.D. Mich. 1982) as authority to support their assertion of clearly established law. In *Jackson* the plaintiff, a police officer, alleged that defendants violated his rights of free speech, privacy and association when the department investigated, suspended and demoted him because of on and off duty misconduct. Plaintiff engaged in a consensual sexual relationship with a woman who he met after the woman filed a complaint with the police department about her boyfriend. Plaintiff took the complaint and told the woman he would personally investigate. Plaintiff, while on duty, subsequently telephoned the woman to update her on the investigation. While he spoke with the woman, plaintiff set up a social visit at her house after he was off duty. Plaintiff again, while on duty, arranged to visit the woman a second time. On both occasions, plaintiff and the woman engaged in sexual intercourse. The woman subsequently complained to plaintiffs superior that she feared for her safety, because she was having an affair with a police officer who had warned her not to get pregnant and tried to force her to engage in sexual acts. Plaintiff was found guilty of conduct unbecoming to a police officer. The plaintiffs conduct was not entirely off duty. Indeed, plaintiff used his position to make the initial contact with the woman and to schedule their social engagements. Plaintiff failed to follow departmental rules regarding the investigation of the woman's complaint in order to create the opportunity to engage in a relationship with her. The court found that the charges against plaintiff after the woman complained, had to be investigated and clearly were not without merit. The court dismissed plaintiff's complaint.

The Sixth Circuit decided a similar issue in *Hughs v. City of North Olmstead*, 93 F.3d 238 (6th Cir. 1996). In that case, a police officer and his wife brought a complaint against the city alleging that the investigation into the officer's intermarital sexual relations violated his constitutional rights to privacy and free association. The police officer was investigated for sexually harassing a coworker, dating a gang member's mother, and bragging to women while on duty about his open marriage and swinging lifestyle. The Sixth Circuit held that the defendants should have been granted qualified immunity, because there was no evidence that the investigation violated a clearly established constitutional right. The court analyzed the opinions in *Briggs* and *Jackson*, and concluded that:

> Although & constitutionally guaranteed right to free association has been inferred by the Supreme Court from the Due Process Clause of the Fourteenth Amendment, *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct.1163, 1171, 2 L.Ed.2d 1488 (1958), and a right of privacy has been found. in several provisions of the Constitution, *Griswold v. Connecticut*, 381 U.S. 479, 484-86, 85 S.Ct. 1678, 1681-82, 14 L.Ed.2d 510 (1965), the Supreme Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits a state (or state actor) from regulating the private consensual sexual behavior of adults. *Carey v. Population. Services International*, 431 U.S. 678, 694 at n. 17, 97 S.Ct. 2010, 2021 at n. 17, 52 L.Ed.2d 675 (1977) (citations omitted); see also *Bowers v. Hardwick*, 478 U.S. 186,191, 106 S.Ct. 2841, 2844; 92 L.Ed.2d 140 (1986) (noting that the Supreme Court has never held that a state is completely prohibited from regulating private consensual sexual conduct between consenting adults).

Id. at 240. The Sixth Circuit held that defendants were entitled to qualified immunity in that case.

The question for the court is whether the prison rule prohibiting employees to have "overly familiar" social contacts with prisoners or their family members violates the employees' clearly established constitutional rights. None of the cases cited by plaintiff involve the application of a prison employment rule. None of these cases involved prison employees or prisoners. Moreover, each of these cases involved an alleged sexual relationship between a police officer and a woman. *Briggs* involved a relationship between a police officer and a woman who was not the officer's wife. The facts of *Briggs* have no application to this case. *Jackson* involved a sexual relationship between a police officer and a woman who filed a complaint with the police officer about her boyfriend, then subsequently complained about the police officer to the officer's superiors. Although the facts of *Jackson* may be closer because plaintiffs in the instant case initiated contact with the prisoners while on duty, no sexual relationship is involved in the instant case and *Jackson* has nothing to do with a prison policy. Similarly, *Hughs* involved a police officer's on the job conduct and alleged sexual harassment.

There is no question that the MDOC has a right to impose employment rules to address security concerns and control employee behavior. A prison setting is unique. The potential for prisoner manipulation, blackmail or intimidation is a real concern in the prison setting. Moreover, the potential for favoritism, or even the appearance of favoritism may constitute a threat to employee, prisoner and public safety. However, freedom of association is guaranteed by the First and Fourteenth Amendments to the United States Constitution, and restrictions imposed on the freedom even in the context of public employment must be reasonably and narrowly tailored. *Pickering v. Board of Education*, 391 U.S. at 563; *Sponick v. Detroit Police Department*, 49 Mich. App. 162, 211 N.W.2d 674 (1973).

Nevertheless, it is my opinion that plaintiffs have failed to establish that the defendants violated any clearly established law in investigating and disciplining plaintiffs under the employee rules for engaging in overly familiar contact with a prisoner, a parolee and a prisoner's family member. Accordingly, it is my opinion, that defendants are entitled to qualified immunity from monetary damages. Defendants however, are not entitled to complete dismissal of this case. Plaintiff's have also asserted claims for equitable relief. The qualified immunity defense does not apply to requests for equitable relief; *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992); *Spruytte y. Walters*, 753 F2d 498 6th 1985, cert. denied 474 US 1054 (1986). Plaintiffs' claims for equitable relief should remain in this case.

Accordingly, it is recommended that defendants' motion to dismiss (Docket #26) be granted in part. Defendants should be entitled to the defense of qualified immunity from liability for monetary damages. It is recommended that plaintiffs' claims for equitable relief should not be dismissed from this action.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

Dated: September 21, 1998

/s/ Timothy P. Greeley
TIMOTHY GREELEY
UNITED STATES MAGISTRATE JUDGE

APPENDIX K

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Jan. 14, 1999]

Case No. 2:97-cv-325
HON. GORDON J. QUIST

DAWN AKERS *et al.*,

Plaintiffs,

v.

KENNETH MCGINNIS, *et al.*,

Defendants.

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on September 21, 1998. The Report and Recommendation was duly served on the parties. The Court has received objections from the plaintiffs. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

The Magistrate Judge recommended that defendants' motion to dismiss should be granted and that plaintiffs' claims for monetary damages should be dismissed based upon the defense of qualified immunity. Plaintiffs argue that the Magistrate Judge erred by recommending that no clearly established law exists prohibiting defendants' conduct. Plaintiffs assert that the Magistrate Judge has improperly distin-

guished the rule of law analyzed in *Briggs v. North Muskegon Police Department*, 563 F. Supp. 585 (W.D. Mich. 1983), aff'd 746 F.2d 1475 (6th Cir. 1984), and *Jackson v. Howell*, 577 F. Supp. 47 (W.D. Mich. 1983), by applying an improper factual analysis. In *Briggs*, the court concluded that the defendant improperly discharged a police officer after it was discovered that he was living with a woman other than his wife. The court stated:

> When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights, see *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), but it has a greater latitude in restricting the activities of its employees than of its citizens in general. *Kelley v. Johnson*, 425 U.S. 238, 245, 96 S. Ct. 1440, 1444, 47 L.Ed.2d 708 (1976). Whether the private activities of a public employee can constitute valid grounds for dismissal requires careful consideration of both the interests of the individual and the interests of the government.

Id. at 587. The court concluded that community disapproval and defendant's interest in the personal sexual activities and living arrangements of its officers, failed to outweigh the plaintiff s privacy interests. Similarly, in *Jackson*, a police officer was suspended and demoted after engaging in a consensual sexual relationship with a woman that he had met after she filed a complaint with the police department. The court dismissed plaintiffs complaint finding that defendants acted properly under the factual circumstances of that case.

Plaintiff argues that the clearly established law is that a state employer may not take adverse action against an employee for engaging in personal relationships without a showing that the relationship affects job performance. More recently, the Sixth Circuit held that a police department which investigated an officer for alleged sexual misconduct was

entitled to qualified immunity where the facts showed that the investigation was not unreasonable because the allegations involved on-duty conduct and related to whether the plaintiff was appropriately conducting himself as a police officer. *Hughes v. City of North Olmsted*, 93 F.3d 238 (6th Cir. 1996).

Similarly, the facts of this case involve plaintiffs who are each employed by the Michigan Department of Corrections (MDOC). Each of the plaintiffs had contact with either a prisoner or parolee, both while on-duty and while off-duty. The Magistrate Judge recognized that the relationship between prisoners and MDOC employees is unique. Manipulation, blackmail and intimidation is a serious threat in managing a prison population that should not be taken lightly. With this in mind, restrictions on freedom of association should be reasonable, and tailored narrowly.

The question raised in defendants' motion is whether they are entitled to qualified immunity. In *Hughes*, the court stated the standard for a qualified immunity analysis.

> In determining whether a constitutional right was clearly established we look first to the decisions of the Supreme Court, then to decisions of this Court and other courts within our Circuit, and finally to the decisions of other Circuits. *Daugherty*, 935 F.2d at 784. However, as a general rule, a district court decision by itself cannot ordinarily clearly establish a law even of its own circuit, much less that of other circuits. See *Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir.1992), cert. denied, 509 U.S. 923, 113 S. Ct. 3038, 125 L.Ed.2d 724 (1993); see also *Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir.1987) (noting that a decision from another circuit is insufficient to clearly establish a constitutional right); *Lojuk v. Johnson*, 770 F.2d 619, 631 (7th Cir.1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L.Ed.2d 795 (1986) (concluding that a circuit court

> case and a district court case from another circuit, along with several other distantly related cases were insufficient to clearly establish a constitutional right).
>
> Moreover, it is the plaintiff's burden to convince the court that the law was clearly established at the time of the offensive conduct. *Daugherty*, 935 F.2d at 783. In doing so, a plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Instead, the plaintiff must show a substantial correspondence between the conduct in question and prior law allegedly establishing the defendant's actions were clearly prohibited. See *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir.1990). Although the plaintiff need not show that the action at issue has previously been held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. In other words, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

Id. at 241. In *Hughes*, the court held that neither *Briggs* nor *Jackson* stated clearly established law that "[a] violation of the right to privacy or free association would occur if a police department conducted an investigation into the marital sexual relations of a police officer accused of sexual harassment." *Id.* at 242. Similarly, plaintiffs have failed to establish that the clearly established law prohibits the MDOC from investigating and disciplining its employees from engaging in "overly familiar" contact with prisoners, parolees, or their family members.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

Dated: JAN 14, 1999

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed Jan. 14, 1999]

Case No. 2:97-CV-325
Hon. Gordon J. Quist

DAWN AKERS, *et al.*,

Plaintiffs,

v.

KENNETH MCGINNIS, *et al.*,

Defendants.

JUDGMENT

In accordance with the Opinion and Order entered this date,

IT IS HEREBY ORDERED that the defendants' motion to dismiss (Docket #26) is granted in part dismissing plaintiffs' claims for monetary damages.

Dated: Jan. 14, 1999

/s/ Gordon J. Quist
GORDON J. QUIST
United States District Judge

APPENDIX M

Michigan Department of Corrections Work Rule 46 (Revised)
[In Effect from April 2000 to Close of Record]

46. SEXUAL MISCONDUCT, SEXUAL HARASSMENT, IMPROPER RELATIONSHIPS, OR OVERLY FAMILIAR CONTACT

For purposes of this rule, "Family Member" means any of the following: parents, stepparents, spouse, children, stepchildren, siblings or step siblings.

For purposes of this rule, "Listed Visitor" means a person on an offender's approved visitors list as provided in PD 05.03.140 "Prisoner Visiting."

Employees are prohibited from:

- Engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.
- Engaging in overfamiliarity with an offender or a family member or listed visitor of an offender.

Employees are further prohibited from retaliating against any person who reports such behavior. Employees shall not disclose to another employee or to an offender that such a report has been filed, the details of the report and/or the status of any investigation, except as required to comply with Department policy or to provide information to their representative in any administrative, civil or criminal proceeding.

An employee shall not make any contact with an offender outside the regular performance of the employee's job except as provided in rule #26, "Improper Entry into a Correctional Facility." Further, an employee shall not make any contact with any family member of an offender, or a listed visitor of an offender, outside the regular performance of the employee's job unless approval has been granted in writing by the Director or applicable Deputy Director or designee. An employee shall use form CAJ-202, "Offender Contact Excep-

tion Request" to request such an exception. If an exception is granted, a copy shall be retained in the employee's personnel file.

If an unavoidable contact is made with an offender, a family member of an offender or a listed visitor of an offender, such contact must be reported verbally to the employee's immediate supervisor by the end of the employee's next regularly scheduled workday. Such reporting is not required if a written exception has been granted as to a family member or a listed visitor. The supervisor will determine whether an unavoidable contact warrants a written report, and if so determined, a copy will be sent to the employee's Warden, Regional Prison Administrator, Field Operations Administration Regional Administrator or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for, an offender, except if the offender is a family member of the employee, including a spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where the employee lives with or provides lodging to an offender who is a family member, this must be immediately reported in writing to the employee's Warden, Regional Prison Administrator, Field Operations Administration Regional Administrator or Central Office Administrator, as applicable.

Unless an exception has been granted pursuant to this rule, examples of behavior which presume overfamiliarity include, but are not limited to:

- Giving or receiving letters, money, personal mementoes or telephone numbers to or from an offender or a family member, or a listed visitor of an offender.
- Being at the residence of an offender or a family member or listed visitor of an offender.

- Non-work related contact or visits with an offender or a family member or listed visitor of an offender without authorization.

Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. An employee who is discharged for violation of this rule or who resigns in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department.

APPENDIX N

Michigan Department of Corrections Work Rule 46
[In Effect September 1999–April 2000]

ADDENDUM TO THE MICHIGAN DEPARTMENT
OF CORRECTIONS
EMPLOYEE HANDBOOK

I. The following revisions are made to the Michigan Department of Corrections Handbook published in June 1996 and are effective as of September 17, 1999.

Definition:

Offender: A prisoner or parolee under the jurisdiction of the Michigan Department of Corrections or housed in a Department facility, or a probationer who is supervised by an employee of the Department.

II. Department Work Rule #24, as it appears in the June 1996 Michigan Department of Corrections Employees Handbook is abolished. As of the effective date of this addendum there is no work rule #24

III. The following is a new work rule to be added to the June 1996 Michigan Department of Corrections Employee Handbook as work rule #46. This rule is effective as of September 17, 1999.

46. SEXUAL MISCONDUCT, SEXUAL HARASSMENT OR OVERFAMILIARITY

Definitions for use with this rule:

"Sexual Misconduct": engaging in or attempting to engage in a sexual act or the intentional touching of genitals, anus, groin, breast, inner thigh or buttocks with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person. This also includes indecent exposure.

"Sexual Harassment": engaging in sexual advances, requests for sexual favors, and other offensive verbal or physical conduct of a sexual nature. This .includes verbal conduct of a gender-related nature intended to humiliate, harass, degrade or arouse.

"Overfamiliarity": conduct which has or is likely to result in intimacy, a close personal or non-work related association.

"Facility": any property owned or leased by the Michigan Department of Corrections.

Work Rule Content:

Employees are prohibited from:

- engaging or attempting to engage in sexual misconduct or sexual harassment with an offender.
- engaging in overfamiliarity with an offender, their family member(s) or their visitors.

Employees are further prohibited from retaliating against any person who reports such behavior. Except as required to comply with Department Policy, employees shall not disclose to another person, including an employee or an offender, that such a report has been filed, the details of the report and/or the status of any investigation.

An employee shall not make any contact with an offender or their family member(s) or their visitor(s) outside the regular performance of the employee's job. If any unavoidable contact is made, such contact must be reported verbally to the employee's immediate supervisor by the end of the employee's next regularly scheduled workday. The supervisor will determine whether the contact warrants a written report, and if so determined, a copy will be sent to the employee's Warden, Field Operations Administration Regional Administrator, or Central Office Administrator, as applicable, within five calendar days.

An employee shall not live with, nor provide lodging for an offender, except for an employee's parents, step-parents, children, step-children, siblings, or step-siblings or spouse where the employee's marriage to the offender existed prior to the employment date or where the spouse became an offender after the employment date. In all cases where lodging is provided, this must be immediately reported to the employee's Warden, Field Office Administration Regional Administrator or Central Office Administrator, as applicable.

Examples of overfamiliarity which are prohibited by this rule include, but are not limited to:

- Giving or receiving letters, money, telephone numbers or anything else that is not authorized by policy to or from an offender, their family member(s), or a visitor.
- Being at the home of an offender, their family member(s), or their visitor(s) for reasons other than official Department business.
- Non-work related contact or visits with an offender, their family member(s), or their visitor(s) without authorization.

Any violations of this rule will be grounds for dismissal. Failure to report unauthorized contact until such contact is detected shall be considered an aggravating factor for determining the level of discipline issued. Department staff who are discharged for violation of this rule or who resign in lieu of termination during an investigation for sexual misconduct, sexual harassment, overfamiliarity, other conduct prohibited by policies established pursuant to these topics or failure to report a violation of Department policy or work rules in these areas will not be eligible for rehire with the Department of Corrections.

APPENDIX O

Michigan Department of Corrections Work Rule 24
[in Effect June 1996–September 1999]

IMPROPER RELATIONS WITH OFFENDERS, OFFENDERS' FAMILIES OR VISITORS

Improper or overly familiar conduct with prisoners, parolees, probationers, family member(s) of a prisoner, parolee or probationer, or visitors is strictly prohibited. A professional employee-to-client relationship must be maintained at all times.

24. IMPROPER RELATIONSHIP: ROMANTIC, SEXUAL, SHARED RESIDENCE, UNAUTHORIZED OR OVERLY FAMILIAR CONTACT.

An employee shall not engage in overly familiar contact nor shall he/she engage in romantic or sexual contact of any nature with a prisoner, parolee, probationer, family member(s) of a prisoner, parolee or probationer, or a visitor.

It is a criminal offense (Criminal Sexual Conduct in the Fourth Degree) if an employee of the Department engages in sexual contact with a prisoner, parolee, or probationer. An employee will be referred for prosecution if such activity is discovered.

An employee shall not make any contact with a prisoner, parolee, probationer, family member(s) of a prisoner, parolee or probationer, or visitors outside the regular performance of the employee's job. If any unavoidable contact is made, such contact must be reported verbally to the employee's immediate supervisor by the next regular business day. The supervisor will determine whether the contact should be reported in writing. If so determined, then the written report should be sent to the employee's Warden, Field Operations Administration Regional Administrator, or Central Office Administrator, as applicable, within five days.

An employee shall not live with, nor provide lodging for a prisoner, probationer or parolee, except for the employee's parents, step-parents, children, step-children or where the employee's marriage to the offender existed prior to the employment date; or where the spouse became a prisoner, probationer or parolee after the employment date. In all cases where lodging is provided, this must be immediately reported to the employee's Warden, Field Office Administration Regional/Administrator or Central Office Administrator, as applicable

Examples of actions that are a violation of work rule #24, include but are not limited to:

- Exchange of letters, money, telephone numbers or anything else that *is not authorized by policy* with prisoners, parolees, probationers, their family member(s) or a visitor.
- Being at the home of a prisoner, parolee, probationer, their family member or a visitor for reasons other than *official* Department business.
- Non-work related contact with a prisoner, parolee, probationer, their family member(s) or a visitor.
- Visit with prisoners without authorization.

Failure to report unauthorized contact until such contact is detected, shall not be considered as an excuse or defense for a rule violation.

Any violations of this rule will be grounds for dismissal.

APPENDIX P

Michigan Department of Corrections Work Rule 12C-D
[In Effect Until June 1996]

12C. *Improper Relationships with Prisoners Parolees or Probationers, Visitors or Families*

Improper or overly familiar conduct with prisoners, parolees or probationers or their family members and visitors is strictly prohibited. A professional client relationship must be maintained at all times. Violations will subject an employee to disciplinary action up to and including dismissal.

Examples of actions that are considered to be improper include (list is not considered exhaustive).

- Exchange of letters, money or items with a prisoner.
- Cohabitation with a probationer or parolee. (Except where a marriage existed prior to the employment date; or where the spouse became a probationer or parolee after the employment date for a marriage that pre-existed the spouse coming under the jurisdiction of the Department of Corrections.) In all cases, this situation must be immediately reported as outlined in Section D of this rule.
- Failure to report until after confronted with inappropriate actions or activities (i.e., physical contact, phone calls, exchange of items) made by prisoner, parolee or probationer.
- Being at the home of a prisoner, parolee or probationer for reasons other than an *official* visit without reporting the visit.
- Giving prisoner your (unlisted or listed) home telephone number.

- Sexual contact of any nature with prisoner or Corrections client.

NOTE: It is a criminal offense (criminal sexual conduct in the fourth degree) if an employee of the Department engages in sexual contact with a person under the jurisdiction of the Department. Employees may be referred for prosecution under Public Act 86 of 1983, if such activity is discovered.

12D. *Unauthorized Prisoner, Parolee or Probationer Contacts*

Any contact made with a prisoner, parolee or probationer, or their family member(s), outside the regular performance of an employee's job, must be reported to the Warden or Regional Administrator responsible for the prisoner, parolee or probationer. See Department Rule #27, "Admission to Institution," for additional guidance. Failure to report such contact will subject an employee to disciplinary action.

Examples of actions that are considered to be unauthorized contacts include (list is not considered exhaustive):

- Failure to report a non-work related contact with prisoner, parolee or probationer,
- Contact with prisoner by writing or by telephone outside of the official work setting.
- Visiting prisoners without authorization.

APPENDIX Q

Offender Contact Exception Request

Employee Name _____
(Print or Type)

Employee Work Location _____
(Print or Type)

Offender Name & Number _____
(Print or Type Name of Offender Associated with the Contact)

I request approval for contact with the following:

☐ Offender under Field Operations Administration (FOA) Supervision

☐ Family Member of Offender _____
(Print or Type Name of Family Member)

☐ Listed Visitor of Offender _____
(Print or Type Name of Visitor on Approved Visitor List)

Reason for contact:

_____ _____
Employee Signature Date

_____
Appointing Authority Name (Print of Type)

_____ _____
Appointing Authority Signature Date

SUBMIT REQUEST TO THE DIRECTOR, APPLICABLE DEPUTY DIRECTOR OR DESIGNER FOR CONSIDERATION AND DISTRIBUTION

Request: ☐ Approved for one year from date of approval. A new request must be made if the employee wishes the exception to continue beyond one year.

☐ Denied. Basis for denial:

_____ _____
Director, Deputy Director or Designee Date

Distribution: Employee, Personnel File, Deputy Director

(3)

Supreme Court, U.S.
FILED
NOV 3 - 2004
OFFICE OF THE CLERK

No. 04-28

In the Supreme Court of the United States

Dawn Akers, Kim Loranger, and United Automobile Aerospace, and Agricultural Implement Workers of America, Local 6000,

Petitioners,

v

Patricia L. Caruso, Robert Steinman, Marsha Foresman, Patricia Caruso, John Marshall, Edward Haggert, George Marra, William Overton, Edward Haggert, Ruth Bare, Frank Eisenhauer, Joseph Jereckos, John Makowski, Terry Pitcher, Kirk McVittie, Gwen Rodgers, in their Personal and Official Capacities, Jointly and Severally

Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

I. The Michigan Department of Corrections has a rule prohibiting, with certain exceptions, its employees from having non-work-related contact with prisoners, probationers, parolees, and their family members because such contact could directly impact the safety and security of the citizens of the State of Michigan. Does this anti-fraternization rule unconstitutionally limit MDOC employees' freedom of association?

PARTIES TO THE PROCEEDING

The caption contains the names of the parties to the proceeding, except that Patricia L. Caruso, who is the current Director of the Michigan Department of Corrections, has been substituted pursuant to S. Ct. Rule 35.3 for the former Director, Kenneth McGinnis.

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BASIS FOR JURISDICTION

This is a civil rights action brought under 42 U.S.C. § 1983. The district court had subject matter jurisdiction because Petitioner raised a federal question. 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction because Petitioner appealed from a final decision of the district court, which granted summary judgment in favor of Respondent. 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the Court of Appeals. 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Michigan Department of Corrections has a Work Rule (the anti-fraternization rule) prohibiting its employees from having non-work-related contact with prisoners, probationers, parolees, and their family members because such contact could directly impact the safety and security of the citizens of the State of Michigan. The Court of Appeals described the anti-fraternization rule, Pet. App. 2a-3a:

> At all times relevant to this litigation, the MDOC has had an anti-fraternization rule barring employees from "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families. "This Rule, originally known as Rule 12 [Pet. App. 123a], strictly prohibited "improper or overly familiar conduct with [offenders] or their family members or visitors." Violations of the Rule "subjected an employee to disciplinary action up to and including dismissal[]." A non-exhaustive list of improper actions included "exchange of letters, money or items, . . . cohabitation [except in case of a pre-existing marriage], being at the home of [an offender] for reasons other than an *official* visit without reporting the visit, . . . giving [offender] [employee's] home telephone number, [and] sexual contact of any nature." (emphasis in original). Furthermore, the anti-fraternization rule required reporting of "any contact made with [an offender], or their family member(s), outside the regular performance of an employee's job." In June 1996, Rule 12 was repromulgated as Rule 24 [Pet. App. 121a]. In September 1999, during the course of this litigation, Rule 24 was replaced by a substantially identical Rule 46 [Pet App. 118a]. Finally, in April 2000, Rule 46 was revised to

> clarify the definitions of family member and visitor and recognize the power of the MDOC to grant individual employees limited exemptions to the Rule [115a].

Petitioners are a current and a former employee of the Michigan Department of Corrections ("MDOC"), and their union. They sued the director of the MDOC, and numerous other MDOC administrators on the grounds that the MDOC rule violated their "clearly established rights to privacy, association, and due process guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendment to the United States Constitution." Specifically, Petitioners sought reinstatement after discharge for violating the anti-fraternization rule, expungement from the plaintiffs' disciplinary records of any reference to a violation of the anti-fraternization rule, and compensatory and punitive damages. On cross-motions for summary judgment, the district court entered an opinion, order, and judgment holding that the anti-fraternization rule was constitutional and that the Respondents enjoyed qualified immunity. Pet. App. 48a, 56a, 57a.

Petitioner Loranger served as probation officer for Wayne County. She exchanged several letters with a prisoner serving a life sentence. After she realized she was in violation of the anti-fraternization rule, she notified her supervisor. Ultimately, the MDOC terminated her for her conduct. During the pendency of this lawsuit, a labor arbitrator reinstated her and imposed only a brief suspension. While this case was pending, Loranger repeatedly sought permission to have contact with a long-time friend, Rebecca Contreras. Loranger became pregnant and hoped Contreras would be her child's godmother. Contreras' son was on probation at that time so the MDOC refused permission for Loranger to have contact with her. The District Court granted a preliminary injunction permitting Contreras to attend the child's baptism. Loranger also sought permission to have contact with a woman named Stacey Artley who was on probation.

Petitioner Akers was a bookkeeper at the Chippewa Correctional Facility who befriended a prisoner. Upon the prisoner's release, she gave him a ride several hundred miles from her home to a job interview in Detroit. The MDOC terminated her employment. An arbitrator subsequently reinstated her and imposed only a brief suspension. The District Court never ruled in Akers' motion for injunctive relief because she transferred to Michigan's Department of Natural Resources.

In *Akers v. McGinnis,* 352 F.3d 1030 (6th Cir. 2003) (Pet. App. 1a), the Court of Appeals affirmed and upheld the anti-fraternization rule. The Court of Appeals examined the anti-fraternization rule under the substantive due process component of the Fourteenth Amendment and the First Amendment's freedom of association component.

Based on earlier Circuit authority, *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985), the Court of Appeals concluded that Petitioner's freedom of association claim should be analyzed under the same standard as freedom of speech claims. The Court of Appeals applied *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1985), to analyze the Work Rule. The Court said, Pet. App. 9a:

> In *Pickering* and *Connick*, the Supreme Court created a test containing two levels of scrutiny. Restraints on government employee speech, or, as in the present case, government employee association, touching on a matter of public concern must meet the *Pickering* test balancing between the interests of the employee and the interests of the state. We have characterized this test as a "form of intermediate scrutiny." . . . Restraints on government employee speech, or government employee association, not touching on a matter of public concern, are subject merely

> to rational basis scrutiny. In either case, it is the court's task to apply the test to the facts. [Footnote omitted.]

The Court of Appeals carefully examined Petitioners' allegations in the complaint and concluded that they did not touch upon matters of public concern. It therefore applied the *Connick* rational basis analysis and upheld the Work Rule, Pet. App. 12a:

> Almost all conceivable association affected by the Rule and all association alleged to have been discouraged by the Rule do not touch on matters of public concern. Loranger wishes to have contacts with an old friend and her "Little Sister." Akers wishes to assist a probationer whom she befriended. While all of these impulses are entirely understandable, even laudable, they are purely private matters of little or no concern to the community as a whole. The plaintiffs also envision hypothetical situations in which they are prevented from contacting a union official who is also related to an offender. But even such hypothetical situations do not rise to the level of public concern because mere individual labor grievances are not matters of public concern.
>
> * * *
>
> Thus, the actual associations denied to the plaintiffs, as well as hypothetical associations suggested in the plaintiffs' briefs, either do not touch on a matter of public concern, or [they touch on political activity that] may be otherwise restrained.
>
> The MDOC easily meets the rational basis test for the non-public association restrained by the anti-fraternization rule.

I. Under the unique factual situation presented here, certiorari is not warranted.

The facts of the case at bar do not present an issue on which this Court should grant certiorari because the instant case deals with an anti-fraternization rule crafted specifically for Department of Corrections employee contacts with convicted felons. It would be unwise for this Court to use this case to review associational rights generally when the facts involve only a very narrow segment of public employees, as to whom the rule is clearly legitimate.

The two principal cases relied upon by the Petitioners, *Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993) and *Hatcher v. Board of Education and Orphanage*, 809 F.2d 1546 (11th Cir. 1987) are easily distinguishable from this case. *Boddie, supra*, concerned a fireman who sought to associate with another union member. Its applicability in this case is very limited because the Court of Appeals in *Boddie* did not have to consider the unique factual situation presented here. In this case, Respondents have enacted a broad prophylactic rule to protect Department of Corrections employees, convicted felons, and their family members from harm. That issue was not present in *Boddie*. Similarly, *Hatcher, supra,* is distinguishable from this case because it dealt with a woman who was allegedly denied a job because she protested school closings. She also attempted to bring her minister and a school board member to a placement meeting. The Court of Appeals in *Hatcher* was not faced with any of the security and safety conditions present in this case. Furthermore, the reasoning in *Hatcher* is highly suspect because it relied on a pre-*Connick* decision, *NAACP v. Alabama*, 357 U.S. 449 (1958), to reach the conclusion that *Connick* does not apply to associational claims.

Petitioners in the instant case are public employees who deal with convicted felons on a daily basis. The State of Michigan's

interest is at its zenith in restraining its employees' behavior when those employees deal with society's most dangerous members. It is inappropriate to compare a case such as this with other employees who do not deal with convicted felons.

This case is significantly different from those noted above. Respondents should be permitted to regulate the behavior of MDOC employees because of overriding security concerns as the Court of Appeals duly noted:

> Given the proven willingness of offenders to break the law, often violently, to reach their ends, on the one hand, and the near-plenary power over offenders entrusted to MDOC employees, on the other, the potential for exploitation of vulnerable offenders by MDOC employees, or vulnerable MDOC employees by offenders needs no elaboration. The MDOC's interest in preventing such exploitation is only somewhat attenuated in cases where the employee has no direct supervisory authority over the offender. Even clerical workers without any penal authority can by the mere manipulation of paperwork, greatly affect an offender's status for better or worse, or at least be pressured into attempting to do so. The inclusion of offenders' visitors and families into the class with whom contact is forbidden may be necessary to prevent the use of third parties to circumvent the harm on direct contact and influence. The MDOC's interest is clearly legitimate, and the rule is a rational means for advancing that interest. [*Akers, supra,* at 1039, Pet. App. 13a.]

The cases relied on by the Petitioners do not involve the security concerns at issue in the present case. The unique nature of dealing with convicted felons make this case a poor vehicle to decide the issues raised by the Petitioners.

Petitioners list a "parade of horribles" which might come about as a result of the anti-fraternization rule such as prohibiting

union members from engaging in union meetings, prohibiting attendance at Alcoholics Anonymous meetings, and prohibiting attendance at Parent-Teacher Association meeting if an offender or a family member of an offender attended the same meeting. However, none of those issues were before the District Court. Neither Loranger nor Akers directly experienced such issues. UAW Local 6000 simply submitted affidavits of potential harms that might occur if the anti-fraternization rule was upheld. None of those individuals referred to in the affidavits were parties to the suit other than through their association with UAW Local 6000. The Petitioners did not litigate any of those hypotheticals in the District Court. Petitioners did not point to any disciplinary action ever suffered by any of these hypothetical employees.

The hypotheticals proposed by the Petitioners suggest they are making a facial challenge to the anti-fraternization rule, but such a challenge cannot succeed. This Court has held that "[A] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Clearly, the anti-fraternization rule is constitutional under circumstances like those in the present case where the safety of the public is paramount.

Finally, whether the *Pickering* balancing test is applied to this case, or the rational basis test, the result would undoubtedly be the same. In applying the balancing test, the overwhelming public necessity to safely and fairly manage convicted felons clearly outweighs any individual interest in social connections, such as those at issue here.

The broad issue of public employee rights in general that Petitioners seek to have this Court consider is simply not presented in this case due to its unique factual circumstances. Therefore, certiorari is not warranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(2)

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No. 04-28

IN THE

Supreme Court of the United States

DAWN AKERS, KIM LORANGER, AND UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 6000,
Petitioners,

v.

PATRICIA L. CARUSO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The respondents cannot dispute the compelling reasons for granting certiorari in this case. They can point to no misstatements of law or fact in the petition. They cannot deny that there is an unusually mature circuit split on one central and squarely presented issue or that there is worsening chaos in the circuits on the other. Nor can they deny the national importance of clear standards to govern analysis of the free association rights of public employees.

Thus bereft of pertinent arguments on the question before the Court, the respondents engage in marginal and half-hearted skirmishes over the merits of their no-contact rule.

For example, they correctly observe that some of the people with whom petitioners are denied contact are offenders. Indeed, the phrase "convicted felons" appears three times on the first page of their argument. If the petition is granted, the correctional context here will no doubt inform the Court's application of constitutional principles to the facts at hand. However, the problem currently facing all public employees and employers, regardless of workplace setting—not to mention litigants and lower courts—is that the principles themselves are in doubt. That is the basis on which certiorari ought to be granted.

In any event, no legal or logical discussion accompanies the respondents' redundant incantation of "convicted felons." The respondents do not acknowledge that Michigan offenders range from those convicted of drunk driving and relatively minor property offenses to those convicted of far more serious matters; that many of the petitioners are clerical employees, social workers, and other human services providers without penological authority; or that the very large majority of the prohibited class consists of offenders' family members and visitors, individuals by definition guilty of no offense. Further, even as to offenders, the respondents do not explain the state's interest in preventing, for example, a clerical employee from attending a PTA meeting where another parent is on probation or a math instructor from attending a meeting to discuss the recent election with a neighbor who is on parole. In short, the respondents have made no real effort to defend this plainly overbroad rule.[1]

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[1] The respondents suggest that the petitioners are making a facial challenge to the rule and that the Court should deny certiorari due to the allegedly low chances of success of such a challenge. This suggestion is without merit. First, as has been clear and explicit since the complaint was filed, the petitioners are challenging the rule both on its face and as applied. Second, the named individual petitioners—Akers and Loranger—have suffered cognizable injuries. Loranger continues to suffer

In another premature gesture toward the merits, the respondents factually distinguish from the case at bar two circuit cases that illustrate the split over the application of the *Connick* public concern threshold to free association claims. *Connick v. Myers,* 461 U.S. 138 (1983). The respondents inform the Court, for instance, that *Boddie v. City of Columbus,* 989 F.2d 745 (CA5 1993), involved a firefighter. That factual point is a non sequitur. What matters here is that the Fifth Circuit, like the Eleventh Circuit, has held that the *Connick* public concern threshold does not apply to free association cases, in direct conflict with the Sixth Circuit in this case and the Second and Seventh Circuits in other cases. The respondents attend to neither this lack of uniformity nor to the consequent need for review by this Court.

Not even by implication do the respondents venture to engage the other issues presented by this case. However, as set forth in the petition, the contours of the intimate association rights of public employees and the use of broad prophylactic regulations in the free association context are critical issues requiring clarification; the former has been the subject of growing uncertainty and confusion for twenty years.

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the infringement of her First Amendment rights and the prospect of additional injuries in the future. Third, UAW Local 6000 has representational standing to challenge the broad range of threatened constitutional injuries faced by its numerous members (not to mention the injuries already wrought by the rule). Fourth, the "hypotheticals" to which the respondents refer in their brief in opposition are in fact past and threatened harms supported by sworn testimony—including the testimony of respondents' own officials. Finally, it is completely proper for the Court to entertain hypotheticals that demonstrate the substantial over-breadth of the rule, which is indeed facially invalid.

CONCLUSION

The inability of the respondents to address the *Connick* split and the other important First and Fourteenth Amendment questions implicated here makes it even plainer that the petition for a writ of certiorari should be granted.[2]

Respectfully Submitted,

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[2] As noted by the respondents and confirmed by the Office of the Clerk, the name of this case is now *Dawn Akers et al. v. Patricia Caruso, et al.* S. Ct. Rule 35.3.